# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 495

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

vs.

WJR, THE GOODWILL STATION, INC., AND COASTAL PLAINS BROADCASTING CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 4, 1949
CERTIORARI GRANTED FEBRUARY 28, 1949

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829600—49——1

1 In the United States Court of Appeals District of Columbia

No. 9464

WJR, THE GOODWILL STATION, INC., APPELLANT

*v.*

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE

Appeal from the Federal Communications Commission

*Joint appendix*

In the United States Court of Appeals District of Columbia

[Title omitted.]

*Notice of appeal from decisions of the Federal Communications Commission and statement of reasons therefor*

Filed Jan. 7, 1947

## I

### NOTICE OF APPEAL

Now comes WJR, The Goodwill Station, Inc., and says that it is aggrieved and that its interests are adversely affected
2 by the decision of the Federal Communications Commission dated August 22, 1946 (reaffirmed by decisions dated October 14, 1946, and December 17, 1946, which last decision was publicly announced at the offices of the Commission on December 18, 1946, denying appellant's Petition for Rehearing, entitled Petition for Reconsideration and Hearing) granting without hearing an application for a radio station construction permit and modified construction permit to Tarboro Broadcasting Co., Inc.

Wherefore, appellant gives notice of its appeal therefrom to the United States Court of Appeals for the District of Columbia.

## II

### STATEMENT OF THE NATURE OF THE PROCEEDINGS

1. Appellant is a corporation organized under the laws of the State of Michigan with its principal office at 2100 Fisher Building, Detroit, Michigan. Appellant is the licensee of radio station WJR, located at Detroit, Michigan, and has been such licensee for 18 years. This station is authorized by the Federal Communica-

tions Commission to operate on 760 kc. with power of 50 kw., unlimited time, and has operated on this assignment (including its prior assignment on 750 kc.) for over 11 years. The rules of the Commission (Sections 3.22 and 3.25) classify WJR as a Class I clear channel station and provide a maximum and minimum power limitation of 50 kw.

2. The Tarboro Broadcasting Company, Inc., filed on May 28, 1946, an application for construction permit seeking authority to construct and operate a new standard broadcast station at Tarboro, North Carolina, on 760 kc. (the same frequency used by appellant) with power of 1 kw., daytime hours only (File No. B3–P–4891). On August 22, 1946, the Commission issued Report No. 877 announcing the granting of the application of Tarboro Broadcasting Co., Inc., subject to the condition that the applicant file within 60 days an application for modification of construction permit specifying a transmitter site and antenna system meeting the requirements of the Commission. This action was taken by the Commission without hearing and without prior notice of its intended action to appellant.

3. On September 10, 1946, and within the twenty-day period prescribed by Section 405 of the Communications Act of 1934, as amended, appellant filed with the Commission a Petition for Rehearing (entitled Petition for Reconsideration and Hearing). In this petition appellant requested that the Commission reconsider its action of August 22, 1946, granting without hearing the application of Tarboro Broadcasting Company, Inc.; that the application be designated for hearing; and that appellant be made a party to the hearing. In the alternative, it was requested that the Commission's action on the Tarboro application be withheld pending decision in Docket 6741 entitled "In the Matter of Clear Channel Broadcasting in the Standard Broadcast Band." The petition was accompanied by an affidavit of a qualified radio engineer and alleged, among other things, that the operation of the proposed Tarboro station would cause objectionable interference within the present interference-free service area of appellant's station; that interference would result to the WJR daytime signal in all counties in upper Michigan and in all or parts of twelve counties in lower Michigan, which area falls within the so-called "cutover" region studied by the Commission in its "FCC Radio Survey, July 1945" introduced as an exhibit in the above-mentioned Clear Channel proceeding; that this exhibit showed that appellant's station is the most listened to station, both day and night, in the so-called "cutover" region; and that a substantial number of listeners depending upon WJR for service in this area would be deprived of such service by the granting of the Tarboro application. Moreover, the affidavit attached to the peti-

tion alleged that interference to WJR's service will occur in the States of Indiana, Ohio, Pennsylvania, and New York.

4. Appellant's Petition for Reconstruction and Hearing also alleged that the Commission erred in granting the Tarboro application while the Clear Channel proceeding (Docket 6741) was pending and undecided; that the Clear Channel proceeding is being held to determine, among other items, whether WJR, a Class I clear channel station, should be permitted to operate with power in excess of 50 kw. and whether the present service in the areas of WJR should be increased or decreased (Issues 3, 4, and 5 in Docket 6741); and that because of the effect of the Tarboro station's operations upon WJR, the granting of the Tarboro application renders difficult, if not impossible, the proper determination of the issues in the Clear Channel proceeding.

5. Appellant desires to operate its station WJR with power of 500 kw. or more but is prohibited from doing so by Section 3.22 of the Commission's rules. On June 13, 1936, appellant filed with the Commission its application to operate with 500 kw. (File No. B2-P-1199), but the application was dismissed without prejudice on June 16, 1942, pursuant to the Commission's wartime policy against the granting of applications requiring the use of additional materials. The Commission will not permit appellant to refile its application for permission to operate with power in excess of 50 kw. By Public Notice No. 89273, dated February 5, 1946, the Commission announced its policy to the effect that applications requesting power in excess of 50 kw. could not be filed until the conclusion of the Clear Channel proceeding and the subsequent modification, if any, of the Commission's rules and regulations. The Clear Channel proceeding was initiated by the Commission's order of February 20, 1945. Several issues relate to the permissive power and service area of clear channel stations, including Nos. 3, 4, 5, and 8. The Notice of Hearing provides that a hearing shall be held to determine:

* * * * * *

"3. What minimum power and what maximum power should be required or authorized for operation on clear channels.

"4. Whether and to what extent the authorization for clear channel stations in excess of 50,000 watts would unfavorably affect the economic ability of other stations to operate in the public interest.

"5. Whether the present geographical distribution of clear channel stations and the areas they serve represent an optimum distribution of radio service or whether the fair, efficient and equitable distribution of radio service among the several states and

communities specified in Section 307 (b) of the Communications Act requires a geographical redistribution at this time.

* * * * * * *

"8. What changes the Commission should order with respect to geographical location, frequency, authorized power or hours of operation of any presently licensed clear channel stations."

These issues remain undecided, as the record in the Clear Channel proceeding is still open, additional hearings will be held, and no decision has been announced by the Commission,

6. On August 27, 1946, Tarboro filed its application for modification of construction permit, which application specified a transmitter site and antenna system (File No. B3–MP–2115), and on September 9, 1946, filed an amendment to its application to change the applicant's name to Coastal Plains Broadcasting Company, Inc. On October 14, 1946, this amended application for modification of construction permit was granted, and on November 25, 1946, the modified construction permit was mailed to the applicant.

7. On October 18, 1946, Tarboro Broadcasting Company, Inc., filed an opposition to appellant's Petition for Reconsideration and Hearing, and on December 17, 1946, the Commission adopted a decision and order denying appellant's petition, public announcement of which was made at the offices of the Commission in Washington, D. C., on December 18, 1946 (Report No. 941).

## III

### Statement of Reasons for Appeal

1. The Commission's decision of August 22, 1946 (reaffirmed October 14, 1946, and December 17, 1946) is contrary to law for each of the following reasons:

a. It results in a substantial modification of appellant's license to operate radio station WJR without notice in writing to appellant or affording appellant an opportunity to be heard as required by Sections 303 (f) and 312 (b) of the Communication Act of 1934.

b. It results in real, destructive and ruinous interference to a very substantial portion of the service area of WJR where WJR's signal is interference-free without giving appellant notice in writing or affording appellant an opportunity to be heard, in violation of Section 312 (b) of the Communications Act of 1934.

c. It deprives a large and substantial number of listeners, presently depending upon WJR for broadcast service, of a listenable signal from WJR in violation of Section 307 (b) of the Communications Act of 1934.

d. It results in a predetermination of the issues in the Clear Channel proceeding in that it makes it much more difficult, if not impossible, for WJR to obtain authorization to operate with power of 500 kw. or more, in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

e. The Commission was without power to grant the Tarboro applications except after a hearing upon issues clearly defined and after affording appellant an opportunity to participate fully in such hearing.

f. The Commission was without power to deny appellant's Petition for Reconsideration and Hearing and finally to grant the Tarboro applications except after full hearing in which appellant was permitted to appear and participate fully therein.

2. The decision complained of (reaffirmed October 14, 1946, and December 17, 1946) is erroneous, arbitrary, and capricious and in violation of the due process clause of the Fifth Amendment to the Constitution of the United States in that it was made without affording appellant notice and an opportunity to be heard.

3. The decision complained of (reaffirmed October 14, 1946, and December 17, 1946) is erroneous, arbitrary, and capricious in that it adversely affects and prejudices, by reason of electrical interference, the appellant's right to operate its station WJR with power of 500 kw. or more, a right presently being litigated in the Clear Channel hearing (Docket 6741), the record in which is still open for the purpose of receiving additional evidence.

4. The Commission's decision (reaffirmed October 14, 1946, and December 17, 1946) is erroneous, arbitrary, and capricious in that the operation proposed by the Tarboro application is not in the public interest, convenience and necessity, as it results in substantial and destructive interference over a wide area to the interference-free service of appellant's station WJR and deprives a large and substantial number of listeners relying upon WJR's service of such service.

5. The Commission erred in failing to grant the relief requested by appellant in its Petition for Reconsideration and Hearing, filed September 10, 1946.

6. The Commission erred in granting the Tarboro applications for construction permit and for modification of construction permit, and in denying appellant's Petition for Reconsideration and Hearing.

7. The decision complained of (reaffirmed October 14, 1946, and December 17, 1946) is illegal, void, and in violation of the due process clause of the Fifth Amendment to the Constitution of the

United States in that appellant was denied a hearing before the Commission.

8 8. The appellant is aggrieved and adversely affected, and also the public interest in receiving efficient radio service is adversely affected, by the decisions complained of in that the service of station WJR will be greatly curtailed over a large area, including that area where substantial numbers of listeners depend upon WJR for broadcast service, and also in that appellant's ability to expand its service to listeners by operating with power of 500 kw. or more will be seriously prejudiced by reason of electrical interference from the Tarboro operation.

## IV

### Relief Requested

Wherefore, the appellant prays an order reversing said decisions of the Federal Communications Commission and for such further relief as this court may deem just and proper.

Respectfully submitted.

WJR, The Goodwill Station, Inc.

By (S) Louis G. Caldwell,
Louis G. Caldwell,
(S) Reed T. Rollo,
Reed T. Rollo,
(S) Percy H. Russell, Jr.,
Percy H. Russell, Jr.,

*Its Attorneys.*

914 National Press Building, Washington 4, D. C.
January 7, 1947.

* * * * *

9 Federal Communications Commission

Docket No. 6741

In the Matter of Clear Channel Broadcasting in the Standard Broadcast Band

*Order re issues*

Whereas, this Commission and its predecessor, the Federal Radio Commission, have since November 11, 1928 designated certain channels in the standard broadcast band as "clear channels" the purpose of which is to render service over large areas and to bring service to the rural population of the United States; and

Whereas, there are still large areas of the continental United States which have no radio service during the day and no primary radio service at night; and

Whereas, the Commission has received many applications requesting authorization for the operation of additional stations and for the use of higher power on the clear channel frequencies; and

Whereas, these applications raise issues which can more appropriately be considered in a general hearing than in a hearing limited to particular applications; and

Whereas, the North American Regional Broadcasting Agreement expires March 29, 1946, and it is desirable to determine what, if any, changes are necessary in connection with clear channel assignments prior to a renegotiation of the treaty;

Now, therefore, it is ordered, this 20th day of February 1945, that a hearing be held before the Commissioner en banc commencing at 10:30 A. M. on May 9, 1945, at the offices of the Commission in Washington, D. C., for the purpose of determining:

1. What recommendation concerning the matters covered by this order the Commission should make to the Department of State for changes in provisions of the North American Regional Broadcasting Agreement.

2. Whether the number of clear channels should be increased or decreased and what frequencies in the standard broadcast band shall be designated as I–A channels and as I–B channels.

3. What minimum power and what maximum power should be required or authorized for operation on clear channels.

4. Whether and to what extent the authorization of power for clear channel stations in excess of 50,000 watts would unfavorably affect the economic ability of other stations to operate in the public interest.

5. Whether the present geographical distribution of clear channel stations and the areas they serve represent an optimum distribution of radio service or whether the fair, efficient, and equitable distribution of radio service among the several states and communities specified in Section 307 (b) of the Communications Act requires a geographical redistribution at this time.

6. Whether it is economically feasible to relocate clear channel stations so as to serve those areas which do not presently receive service.

7. What new rules or regulations, if any, should be promulgated to govern the power or hours of operation of Class II stations operating on clear channels.

8. What changes the Commission should order with respect to geographical location, frequency, authorized power or hours of operation of any presently licensed clear channel station.

9. Whether and to what extent the clear channel stations render a program service particularly suited to the needs of listeners in rural areas.

10. The extent to which the service areas of clear channel stations overlap and the extent to which this involves a duplication of program service.

11 11. What recommendation, if any, the Commission should make to the Congress for the enactment of additional legislation on the matters covered by this order.

It Is Further Ordered, that persons or organizations desiring to appear and testify shall notify the Commission of such intention on or before April 2, 1945, stating the names of all witnesses who will appear, the topic each will discuss, and the time expected to be required for the testimony.

FEDERAL COMMUNICATIONS COMMISSION.
T. J. SLOWIE, *Secretary.*

* * * * *

Before Federal Communications Commission

*Appearance of Clear Channel Broadcasting Service and its members*

April 2, 1945

Responding to the Commission's order in the above-entitled cause, the Clear Channel Broadcasting Service and its members, comprising the following licensees of clear channel stations:

Licensee and Call Letters
Earle C. Anthony, Inc., KFI.
A. H. Belo Corporation, WFAA.
National Life & Accident Insurance Co., WSM.
Courier Journal & Louisville Times, WHAS.
Stromberg-Carlson Telephone Manufacturing Co., WHAM.
WJR The Goodwill Station, WJR.
Southland Industries, Inc., WOAI.
Carter Publications, Inc., WBAP.
WCAU Broadcasting Co., WCAU.
Loyola University, WWL.
Central Broadcasting Co., WHO.
Atlanta Journal Co., WSB.
12 WGN, Inc., WGN.
Crosley Corporation, WLW.
Agricultural Broadcasting Co., WLS.
Westinghouse Radio Stations, Inc., KDKA.

hereby notify the Commission of their desire to appear and testify at the hearing to be held herein. This appearance is filed

in behalf of the foregoing parties both collectively as a group and individually so as to reserve to each licensee full liberty to make such separate or supplementary presentation and to take any and all other steps in the course of the proceedings in its own name and behalf as it may deem necessary or desirable.

Notwithstanding the utmost diligence on the part of the above-named parties, they are unable at this time to state the names of the witnesses who will appear in their behalf, the topics each witness will discuss, or the time expected to be required for the testimony. This is because the work that has so far been accomplished in preparation on the issues is not sufficiently advanced.

Respectfully advanced.

LOUIS G. CALDWELL,
*Counsel for the above-named parties.*

* * * * *

*Public Notice 89273*

FEDERAL COMMUNICATIONS COMMISSION,
WASHINGTON 25, D. C., *February 5, 1946.*

On February 1, 1946, the Federal Communications Commission adopted four orders dismissing without prejudice a number of applications which involved direct conflicts with Commission Rules. The orders however, provide procedures for reinstatement of the dismissed applications at the conclusion of general legislative proceedings now pending before the Commission. In the event the Commission's rules are subsequently modified, suitable notice will be afforded all interested persons and a period will be provided in which to file competing applications. In the interest of orderly administration it is desired to emphasize that pending applications inconsistent with the Commission's Rules do not afford parties any equities or priorities on the frequency.

The applications thus dismissed are divided into four categories: (1) Those involving conflict with Section 3.25 (a) in that they request duplicate nighttime operation on channels reserved for the exclusive nighttime use of one station only; (2) Applications involving conflict with Section 3.25 (d) since nighttime operation is requested on a channel available for daytime operation only, in the United States; (3) Applications involving conflict with Section 3.22 which propose operation with a power in excess of 50 kw., the maximum permitted by Commission Rules; and (4) Applications requesting the use of frequencies for standard broadcast stations which are not presently included in the frequencies allocated for that service.

All interested parties affected by these orders have been or will be afforded opportunity to resent evidence for consideration in connection with the Clear Channel and General Allocation Hearings. However, parties will not be permitted to offer evidence in those hearings on the merits of particular applications.

With respect to applications proposing operation in accordance with present rules on the frequencies listed under Section 3.25 (a) (i. e. those requesting limited time or daytime only assignments), the Commission has been concerned with the possibility that a grant of a large number of such applications would further complicate the problems that are involved in the Clear Channel Hearing. Further study of this matter has resulted in the con-
14 clusion that in many instances placing additional daytime only stations on the U. S. 1–A channels may not unduly complicate the problems, and accordingly all such applications will be considered individually on their merits. When no conflict with a resolution of the general problems that are at issue in the Clear Channel hearing can be foreseen, additional daytime assignments on U. S. 1–A channels may be made before conclusion of the hearing. It is, however, possible to foresee that severe complications may arise by authorizing the operation of additional limited time stations, and such applications will be given careful consideration, with a view to determining the possible complications, and in the event they can be foreseen, the applications may be conditionally granted for daytime operation only.

*Public Notice 95034*

FEDERAL COMMUNICATIONS COMMISSION,
WASHINGTON 25, D. C., *June 21, 1946.*

The Federal Communications Commission in its Public Notice, dated February 5, 1946, stated that with respect to applications proposing operation daytime only or limited time on the frequencies listed under Section 3.25 (a) of its Rules, the Commission has been concerned with the possibility that a grant of a large number of such applications would further complicate the problems that are involved in the Clear Channel Hearing, but that when no conflict with the resolution of the general problems that are in issue in the Clear Channel Hearing can be foreseen, additional daytime assignments on United States 1–A clear channels may be made before conclusion of that hearing.

Further consideration of the problems involved in making Class II station assignments on 1–A frequencies has resulted in a decision to adopt the following procedure: (1) The Commission will withhold action on all applications involving use of 1–A frequencies, daytime or limited time, where the proposed sta-

15 tion is more than 750 miles from the dominant 1-A station using a nondirectional antenna on the frequency requested or is outside the 0.5 mv/m 50% skywave contour of the dominant class 1-A station using a directional antenna on the frequency requested. (2) The Commission will consider on their individual merits applications involving use of 1-A channels, daytime or limited time, where the proposed station is 750 miles or less from the dominant 1-A station using a nondirectional antenna on the frequency or is within the 0.5 mv/m 50% skywave contour of the dominant class 1-A station using a directional antenna on the frequency requested. Applications in this category will not at this time be granted limited time, but will be considered and may be conditionally granted for daytime operation only.

Applications filed with the Commission which come within the first category above will be placed in the Commission's pending file and held without further action until conclusion of the proceedings in the Clear Channel Hearing, (Docket No. 6741). After the conclusion of the Clear Channel Hearing, suitable notice will be afforded all interested persons and a period will be provided in which to file competing applications.

Applications in direct conflict with Section 3.25 or 3.22 of the Commission's Rules with respect to time of operation, power limitation or frequences will, as set forth in the Commission's Public Notice of February 5, 1946, be dismissed without prejudice.

* * * * * *

Southwest Iowa Broadcasting Co., Creston, Iowa, 750 kc., 1 kw., D. (B4-P-4683).

Arthur H. Groghan, Santa Monica, Calif., 750 kc., 1 kw., L-WSB, (B5-P-4236).

Donnelly C. Reeves, Hanford, Calif., 870 kc., 250 w., D. (B5-P-4423).

Radio Broadcasting Associates, Houston, Texas., 1180 kc., 250 w., D. (B3-P-4563).

Scenic City Broadcasting Co., Middleton, R. I., 1200 kc., 250 w., L-WOAI (B1-P- ).

16 C. Mervin Dobyns, San Bernardino, Calif., 1180 kc., 1 kw., D. (B5-P-4689).

Southern California Broadcasting Co., Monterey Park, Calif., 830 kc., 5 kw., D. (B5-P-3710; Dock. 6737).

Bay Cities Radio Corp., Santa Monica, Calif., 890 kc., 1 kw., D. (B5-P-4481).

Niagara Falls Gazette Publishing Co., Niagara Falls, N. Y., 1200 kc., 1 kw., L-WOAI (B1-P-3879).

Times Star Publishing Co., Alameda, Calif., 1210 kc., 1 kw., D. (B5-P-4418).

* * * * * *

File No. B2–S–331. Official No. 331. Call letters WJR

Federal Communications Commission

*Radio broadcasting station license*

Modified in accordance with Order 107–A adopted July 10, 1945

Subject to the provisions of the Communications Act of 1934, subsequent acts and treaties, and all regulations heretofore hereafter made by this Commission, and further subject to conditions set forth in this license, the Licensee WJR, The Goodwill Station, Inc., is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting for the term beginning October 1, 1945, and ending November 1, 1946 (3 a. m., Eastern Standard Time).

The licensee shall use and operate said apparatus only in accordance with the following terms:

1. On a frequency of 760 kc.

2. With power of 50 kilowatts.

Antenna current 23.06 amperes for 50 kilowatts.

Antenna resistance 94 ohms.

3. During the following period or periods of time:

17 Unlimited time.

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

4. Under the call letters WJR.

5. With the main studio of the station located at 2800 Fisher Building, West Grand and Second Boulevards, Detroit, Michigan.

The apparatus hereinabove authorized to be used and operated is located at: Wyandotte, S. W. Corner Sibley and Grange Road, approximately 16 miles south of Detroit, Michigan. Lat. 42°10′07″ North, Long. 83°13′00″ West and is described as follows: Western Electric, Type 306–B, Broadcasting Transmitter, Serial No. 101. Direct Crystal Control. Last radio stage: six 8.5 kilowatt vacuum tubes for low level modulation. (Federal 342–A). Maximum rated carrier power output 50 kilowatts. Antenna: Single uniform cross-section tower; height of vertical lead, 700′; over-all height above ground, 710′. Ground system consists of 120 radials 600′ long, buried 8″. Tower painted and lighted in accordance with the attached specifications.

For emergency purposes only, when by reason of break-down or similar reason the said apparatus cannot be used, the licensee is authorized to use and operate (but only in accordance with the terms and conditions of this license) the auxiliary radio transmitting apparatus located at: Wyandotte, S. W. Corner Sibley and Grange Road, approximately 16 miles South of Detroit, Michigan, with power of: 10 kilowatts. Antenna current—10.31 amperes for 10 kilowatts; antenna resistance—94 ohms and
18 described as follows: Western Electric, Type 105–C–Modified, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: four 2½-kilowatt vacuum tubes for low level modulation (Federal Telegraph 320–B). Maximum rated carrier power output 10 kilowatts.

This license is issued on the licensee's representation that the statements contained in licensee's application are true and that the undertakings therein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the terms hereof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this 17th day of September 1945. This license supersedes license dated September 17, 1945, effective 10–1–45.

By direction of the Federal Communications Commission,

[SEAL] ----------

*Secretary.*

rck.

* * * * *

19 Date filed 5–28–46

File No. B3–P–4891. Call Letters New

Federal Communications Commission

*Application for new standard broadcast station construction permit*

(Submit application and all exhibits, in triplicate, to Federal Communications Commission, Washington, D. C. Swear to at

least two copies. If space provided is insufficient attach inserts.)

Before executing application see Communications Act of 1934, as amended, Part 1 (Rules of Practice and Procedure), Part 2 (General Rules and Regulations), and Part 3 (Standard Broadcast Rules) of the Commission's Rules and Regulations and the Standards of Good Engineering Practice Concerning Standard Broadcast Stations. All technical terms, such as "normally protected contours" and "objectionable interference," are for convenient reference only and are to be construed as having the same meaning as when used in the Rules and Regulations and the Standards. The use of the terms "normally protected contours" and "objectionable interference" shall not be taken as implying any right to protection of such contours or from such interference.

To the Federal Communications Commission:

1. Name of applicant: Tarboro Broadcasting Company, Inc.

2. Post-office address: State North Carolina City Tarboro Street and number c/o Hanner Motor Company.

3. Notices and communications with respect to this application are to be addressed to the following-named person at the address indicated:

John C. Hanner, c/o Hanner Motor Company, Tarboro, N. C.

Frank U. Fletcher, Attorney, 737 Woodward Building, Washington 5, D. C.

* * * * *

Federal Communication Commission, Sept. 10, 1946,
office of Secretary

Before the Federal Communications Commission

File No. B–3–P–4891

In re Application of Tarboro Broadcasting Co., Tarboro, North Carolina, For Construction Permit

*Petition for reconsideration and hearing*

WJR, The Goodwill Station, Inc., by its attorneys, hereby petitions the Commission to reconsider its action of August 22, 1946 whereby it granted without a hearing the above-entitled application and to designate such application for hearing making WJR a party thereto; or, in the alternative; to hold in abeyance any grant of such application pending a decision in the Clear Channel case, Docket 6741.

In support of its request, petitioner states:

1. Petitioner is the owner, operator, and licensee of Station WJR, which operates on 760 kc, a Clear Channel, Class Ia frequency, with 50 kilowatts power, unlimited time.

2. Tarboro Broadcasting Company, by the Commission's action, has been granted a permit to construct a new standard broadcast station at Tarboro, North Carolina, for operation on 760 kc. with power of 1 kilowatt, daytime only. As a result of such operation, the present interference-free service area of WJR will be subjected to objectionable interference. Details of such objectionable interference are set forth in an affidavit by George F. Leydorf, a qualified radio engineer, which is attached hereto as Exhibit A.

21 3. As shown by Exhibit A, interference will result to the WJR daytime signal in all counties in upper Michigan and twelve (12) counties in lower Michigan. This area falls within the so-called "Cut-over" region studied by the Commission in its "FCC Radio Survey, July 1945," which survey has been made a part of the record in the Clear Channel case. Particular reference is made to Vol. III, Part 1—Table 1–17 of that Survey (Exhibit 64) which shows that WJR is the most listened to station, both day and night, in the "Cut-over" region. The substantial number of listeners now depending upon WJR service in this area will be deprived of such service through the operation of the proposed Tarboro station.

4. Moreover, the Commission's action complicates the issues in the Clear Channel case, Docket 6741. The grant of the Tarboro application is not conditioned in any way upon whatever decision the Commission may make in the Clear Channel case. Thus, the grant may make it difficult, if not impossible, for the Commission to decide properly the issue of whether or not WJR, a dominant station operating on a clear channel, should be granted increased power (issues Nos. 3 and 4); whether or not the present service area of WJR should be diminished or increased (issue No. 5); and related issues. Any other conclusion of the effect of the Commission's action would have to be predicated upon the assumption that the Commission in the Tarboro case has already made a final determination of certain issues in the Clear Channel case. Such a determination of any one of the Clear Channel issues in an individual case as here, prior to proper and thorough consideration of the evidence and entire record in the Clear Channel case and prior to the issuance of proposed findings and conclusions by the Commission on all issues involved, would be improper.

Wherefore, the petitioner requests the Commission to reconsider its action of August 22, 1946 and to designate the Tarboro Broadcasting Company application for hearing or, in

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the alternative, to hold in abeyance its grant of such application until after a decision in the Clear Channel case.

Respectfully submitted.

LOUIS G. CALDWELL,
REED T. ROLLO,
KELLEY E. GRIFFITH,
*914 National Press Building, Washington 4, D. C.,*
*Its Attorneys.*

* * * * *

EXHIBIT "A"

*Affidavit of George F. Leydorf*

George F. Leydorf, having been duly sworn on oath, deposes and says as follows:

The effect of daytime operation of a 1 KW Station on 760 KC/S located at Tarboro, North Carolina on the service now being rendered by WJR, Detroit, has been studied. In this study the measured field intensity of WJR was used and the field intensity of the Tarboro, North Carolina Station was obtained from the 10%, 10 A. M. to 2 P. M. curve from F. C. C. exhibit 7, Docket No. 5072–A. The inverse field of the Tarboro Station was assumed to be 175 MV/M at one mile. Interference was assumed to take place when the field intensity of this Tarboro Station exceeded 10% of the time was 5% or more of the average measured field intensity of WJR, which is in accord with present F. C. C. standards.

These calculations show that the service of WJR will be interfered with between the hours of 10 A. M. and 2 P. M. northwest and north of a line passing through the northern part of Lower Michigan. This line is located approximately as follows:

Starting near Luddington, Mason County, Michigan, the line runs northeast, passing three miles southeast of Manistee, Manistee County, thence about three miles southeast of Traverse City,
Grand Traverse County, thence about two miles north of
23 Gaylord, Otsego County, and, turning more easterly, reaches Lake Huron about five miles south of Presque Isle, Presque Isle County.

Interference will take place in all of upper Michigan and in counties, or approximate fractional parts of counties of Lower Michigan as follows:

| County | Fraction of county affected |
|---|---|
| Mason | NW 1/10 |
| Manistee | NW 1/4 |
| Benzie | NW 9/10 |

| County | Fraction of county affected |
|---|---|
| Grand Traverse | NW 1/5 |
| Leelanau | All |
| Antrim | NW 2/3 |
| Charlevoix | All |
| Emmet | All |
| Otsego | North 1/3 |
| Cheboygan | All |
| Montmorency | NW 1/10 |
| Presque Isle | North 9/10 |

In the above-mentioned area the field intensity of WJR averages 32 microvolts per meter or less during daytime hours. However, over much of this region WJR provides the best signal available.

This area falls within the cut-over region studied in the F. C. C. Radio Survey, July 1945, collected and compiled by the Bureau of the Census for the F. C. C. and which is in evidence on Docket No. 6741 as Exhibit 74. The survey shows that in the cut-over region WJR is the most listened to station, both day and night (see Description of F. C. C. Radio Survey; and F. C. C. Radio Survey, July 1945, Vol. IXI, Part 1, Tables 15–8, 16–8, and 17–8).

The calculations also show that interference will be found in the States of Indiana, Ohio, Pennsylvania, and New York. However, in the bulk of the area affected, a better signal is provided by other stations.

During the hours between sunrise and 10 A. M.; and be-
24 tween 2 P. M. and sunset the skywave of the Tarboro Station will be stronger than the values used for the 10 A. M.–2 P. M. calculations. There will be some sky wave present in the WJR signal as well, but it will not be strong enough to increase the median value of the WJR field intensity proportionately. Therefore, during these hours, interference will exist closer to WJR than the boundary line described above.

The useability of the WJR signal in Northern Michigan is verified by the atmospheric noise data in evidence on Docket 6741 (Exhibit 264 fig. 12–3 and Exhibit 109 fig. 2–1). According to these data 40 microvolts per meter will give atmospheric noise free reception for 50% of the year, and therefore 30 microvolts per meter will give atmospheric free reception for 35% of the year. Since atmospheric noise is largely concentrated in the six summer months of the year, the service of WJR during the six winter months will be noise-free for a large percentage of the time.

On the other hand, daytime transmission data now being compiled indicated that the daytime skywave field intensity during the six winter months is substantially stronger than during the summer months.

829600—49——3

The interference which would be caused by the proposed Tarboro Station would therefore be concentrated in the winter months, during which the WJR service in Northern Michigan and similar remote areas is now most acceptable. The concentration of interference within the winter months not only substantially increases the number of hours lost at the 32 microvolt per meter contour, but also results in the loss of 10% of the hours at much higher contours during the winter season.

George F. Leydorf.
GEORGE F. LEYDORF.
*Chief Engineer.*
*WJR, The Goodwill Station, Inc.*

Sworn to and subscribed before me this 5th day of September 1946.

[SEAL] MURIEL F. HALL, *Notary Public.*

My Commission expires March 28, 1949.

* * * * *

Federal Communications Commission, Sept. 23, 1946
Office of Secretary

Before the Federal Communications Commission

File No. MP–2115

(Filed August 27, 1946)

In the Matter of COASTAL PLAINS BROADCASTING CO., INC., VICE TARBORO BROADCASTING COMPANY, INC., TARBORO, NORTH CAROLINA, FOR MODIFICATION OF CP.

*Amendment to application*

Comes now Tarboro Broadcasting Company, Inc., applicant in the above entitled cause, and respectfully amends its application for modification of CP so as to change the name of the applicant corporation from Tarboro Broadcasting Company, Inc., to Coastal Plains Broadcasting Company, Inc. The change of this name was accomplished through an amendment to the charter of the applicant corporation, three copies of which are attached hereto.

Dated this 19 day of September 1946.

COASTAL PLAINS BROADCASTING CO., INC.
(Name of Applicant)
By John C. Hanner,
JOHN C. HANNER,
*Secretary-Treasurer.*
(Authorized officer or attorney)

26 Subscribed and sworn to before me this 19th day of September 1946.

[SEAL] W. E. PIERCE, *Notary Public.*

My commission expires May 29, 1948.

* * * * * *

Federal Communications Commission, Oct. 18, 1946
Office of Secretary

Before the Federal Communications Commission

File No. B3–P–4891

In the Matter of TARBORO BROADCASTING CO., TARBORO, NORTH CAROLINA, FOR CONSTRUCTION PERMIT

*Opposition to petition for reconsideration and hearing*

Tarboro Broadcasting Company by its Attorney hereby files its opposition to the Petition of WJR for reconsideration and hearing on its application, and respectfully requests the Commission to accept this opposition even though filed late (i. e., more than ten days after the petition was filed).

1. The Petitioner has not alleged that the proposed operation of Tarboro Broadcasting Company would cause any interference within the normally protected service area of station WJR.

2. The allegation of interference to a presently "interference free service area of WJR" is not supported by proof of the existence of such service. In fact, it is entirely likely that the signal intensity alleged to be interfered with by the proposed operation of Tarboro is already subject to a natural atmospheric noise level limitation of greater intensity (see affidavit of George C. Davis attached hereto as Exhibit A).

27 3. Petitioner in its allegation that WJR provides the best signal available over much of the area within which interference is alleged overlooks the assignment of two new standard broadcast stations to Alpena, Michigan, one new station to Petoskey, Michigan, one new station to Cadillac, Michigan, and the operation of WTCM at Traverse City, Michigan. All of these stations are rendering service to a large portion of the area in which interference free service is alleged by petitioner.

4. Petitioner has not alleged nor has it proven any interference within its normally protected contours. That such interference would not take place is clearly established by the affidavit of George C. Davis attached as Exhibit A.

Wherefore, the premises considered, it is respectfully requested that the Petition of WJR for reconsideration and hearing be denied and that the Tarboro Broadcasting Company be permitted to proceed with the construction of the station authorized by the Commission on August 22, 1946.

Respectfully submitted.

TARBORO BROADCASTING COMPANY,
By Frank U. Fletcher,
FRANK U. FLETCHER,
*Its Attorney.*

Dated October 18, 1946.

* * * * *

*Exhibit "A"*

Affidavit of George C. Davis

Pursuant to employment by the Tarboro Broadcasting Company, permittee of a new broadcast station at Tarboro, North Carolina, for operation with 1 kw. on 760 kc., daytime only,
28 examination was made of a petition and affidavit filed by WJR in connection with this application, File No. B3–P–4891.

It is my opinion that the engineering considerations set forth in the affidavit attached to the petition do not give proper weight to certain very pertinent facts. Among these are the following:

1. The affidavit states that "over much of this region WJR provides the best signal available." This statement completely neglects the assignment of two new stations to Alpena, Michigan, of one new station to Petoskey, Michigan, one new station to Cadillac, Michigan, and the operation of WTCM, Traverse City, Michigan.

2. The affiant seeks to protect a signal on the order of 32 microvolts per meter or less from interference from other stations on the same frequency. The FCC Standards of Good Engineering Practice, Section 1, Table 4, indicates that Class 1A stations are protected from interference on the same frequency to the 100-microvolt-per-meter contour daytime. The permissible interference signal on the same channel for 100% of the daytime hours at the 0.1 mv/m contour of the Class 1A station may be as high as 5 microvolts per meter. (See Table 4, Section I, FCC Standards and footnote 3 to Table 4.) The petitioner is objecting to a signal which is not present 100% of the time and which is much less than the permissible 5 microvolts per meter signal.

3. The signal required to produce interference to a 32-microvolt-per-meter signal on the same frequency would be 1.6 microvolts

per meter (0.0016 mv/m). This signal is probably no greater limitation than occurs from natural atmospheric noise limitations to the signal of WJR. Figure 14–3, which is a map of the United States, and Figure 4–1, released in connection with the Clear Channel Committee noise studies, indicate that during daytime hours a signal level of approximately 0.3 mv/m would be required in the northern Michigan area on 760 kc. for recepition to be free from atmospheric noise for 90% of the year. Similarly
29 Figure 12–3 of the proposed Standards of Good Engineering Practice indicates a signal level of from 30 to 40 microvolts will be required on 1000 KC for atmospheric-noise-free reception during daytime hours for 50% of the year. Applying the ratios of Figure 4–1, signal levels of from 38 to 51 microvolts would be required for atmospheric-noise-free reception on 760 KC for 50% of the year.

Therefore, it is my opinion that the operation of the station authorized to the Tarboro Broadcasting Company will not produce objectionable interference to the service of WJR within its normally protected contour.

The affiant states that he is consulting engineer for the Tarboro Broadcasting Company, Tarboro, North Carolina, and that his qualifications are a matter of record in the Federal Communications Commission.

George C. Davis.
GEORGE C. DAVIS.

Subscribed and sworn to before me this 16th day of October 1946.

MYRTLE A. HUFFER, *Notary Public.*

My Commission Expires April 30th, 1949.

* * * * *

30 F. C. C. Form No. 351. (Revised August 25, 1936.)
File No. B3–MP–2115, B3–P–4891.

Call letters WCPS

Federal Communications Commission

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*Regular broadcast station construction permit and modification*

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofore or hereafter made thereunder, and further subject to the conditions set forth in this permit, authority is hereby granted to Coastal Plains Broadcasting Co, Inc., to construct a radio transmitting station located and described as follows:

1. Location of transmitter: State North Carolina, County Edgecombe, City or town, 2.7 miles NW. of Tarboro Street and number On U. S. Highway #64 N. Latitude: Degrees 35, minutes 55, seconds 40, W. Longitude: Degrees 77, minutes 34, seconds 15.

2. Location of main studio: State of North Carolina, County Edgecombe, City or town, 2.7 miles NW. of Tarboro Street and number on U. S. Highway #64.

3. Description of transmitting apparatus:

Raytheon Mfg. Co., Type RA–1000, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: two 500-watt vacuum tubes for high level modulation (RCA 833). Maximum rated carrier power output 1 kilowatt.

Antenna: 275′ (280′ over-all height) uniform cross-section, guyed, series fed, vertical radiator. Ground system consists of at least 90 radials 325′ or more long of buried copper wire.

31 Tower to be painted and lighted in accordance with the attached specifications.

Power to be determined by the direct method (Sec. 3.51). The enclosed copies of FCC Form 306 should be submitted simultaneously with FCC Form 302.

4. The frequency, operating power, and hours of operation will be as follows:

(a) Frequency 760 kilocycles.

(b) Power (1) Night ———. (2) Day 1 kilowatt.

(c) Hours of operation Daytime as follows: Oct. 6:15 a. m. to 5:30 p. m.; Nov. 6:45 a. m. to 5:00 p. m.; Dec. 7:15 a. m. to 5:00 p. m.; Jan. 7:15 a. m. to 5:15 p. m.; Feb. 7:00 a. m. to 5:45 p. m.; Mar. 6:15 a. m. to 6:15 p. m.; Apr. 5:45 a. m. to 6:45 p. m.; May 5:00 a. m. to 7:15 p. m.; June 4:45 a. m. to 7:30 p. m.; July 5:00 a. m. to 7:30 p. m.: Eastern Standard Time.

5. Date of required commencement of construction By December 14, 1946.

6. Date of required completion of construction, June 14, 1947.

7. (a) Upon the completion of construction in exact accord with this permit, and provided the Commission and the Inspector of Radio are notified two days in advance, the permittee is authorized—

(1) To conduct equipment tests between 1 a. m. and 6 a. m., local standard time, for a period not to exceed 10 days, on the frequency and with the power herein specified.

(b) Upon the completion of equipment tests, and provided an application for radio broadcasting station license has been filed with the Commission, showing the transmitter to be in satisfactory operating condition; and provided further, that the Commission

and Inspector of Radio are notified two days in advance, the permittee is authorized—

(1) To conduct broadcast program tests for a period not to exceed 30 days, on the frequency, with the power, and during the hours of operation herein specified.

32 (c) The authority herein contained to conduct tests shall not be construed as a radio broadcasting station license, but only to make tests incident and necessary to proper construction of the station, and the Commission reserves the right to cancel or modify such authority.

8. This permit shall be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless completion of the station is prevented by causes not under permittee's control.

Dated this 14th day of October 1946.

By direction of the Federal Communications Commission,

[SEAL] T. J. SLOWIE, *Secretary.*

* * * * *

File No. B2–R–331. Official No. 331. Call letters WJR

Federal Communications Commission

*Radio broadcasting station license*

Subject to the provisions of the Communications Act of 1934, subsequent acts, and treaties, and all regulations heretofore hereafter made by this Commission, and further subject to conditions set forth in this license, the Licensee WJR, The Goodwill Station, Inc., is hereby authorized to use and operate the radio transmitting apparatus hereinafter described for the purpose of broadcasting, for the term beginning November 1, 1946, and ending November 1, 1949.

The licensee shall use and operate said apparatus only in accordance with the following terms:

33 1. On a frequency of 760 kc.

2. With power of 50 kilowatts, with an additional * * * watts from local sunrise to local sunset only. Antenna current 23.06 amperes for 50 kilowatts; * * * amperes for * * * watts. Antenna resistance 94 ohms.

3. During the following period or periods of time: Unlimited time.

4. Under the call letters WJR.

5. With the main studio of the station located at: 2800 Fisher Building, West Grand and Second Boulevards, Detroit, Michigan.

The Commission reserves the right during said license period of terminating this license or making effective any changes or modification of this license which may be necessary to comply with any decision of the Commission rendered as a result of any hearing held under the rules of the Commission prior to the commencement of this license period or any decision rendered as a result of any such hearing which has been designated but not held, prior to the commencement of this license period.

The apparatus hereinabove authorized to be used and operated is located at:

Wyandotte, S. W. Corner Sibley and Grange Road, approximately 16 miles south of Detroit, Michigan, Lat. 42° 10′07″ North, Long. 83° 13′00″ West, and is described as follows: Western Electric, Type 306–B, Broadcasting Transmitter. Serial N. 101. Direct Crystal Control. Last radio stage: six 8.5 kilowatt vacuum tubes for low level modulation (Federal 342–A). Maximum rated carrier power output 50 kilowatts. Antenna: Single uniform cross-section tower; height of vertical lead, 700′; over-all height above ground, 710′. Ground system consists of 120 radials 600′ long, buried 8″. Tower painted and lighted in accordance with the attached specifications.

For emergency purposes only, when by reason of breakdown or similar reason the said apparatus cannot be used, the licen-
34 see is authorized to use and operate (but only in accordance with the terms and conditions of this license) the auxiliary radio transmitting apparatus located at:

Wyandotte, S.W. Corner Sibley and Grange Road, approximately 16 miles south of Detroit, Michigan, with power of: 10 kilowatts. Antenna current—10.31 amperes for 10 kilowatts; antenna resistance—94 ohms, and described as follows:

Western Electric, Type 105–C–modified, Broadcasting Transmitter. Direct Crystal Control. Last radio stage: four 2½ kilowatt vacuum tubes for low level modulation (Federal Telegraph 320–B). Maximum rated carrier power output 10 kilowatts.

This license is issued on the licensee's representation that the statements contained in Licensee's application are true and that the undertakings herein contained so far as they are consistent herewith, will be carried out in good faith. The licensee shall, during the term of this license, render such broadcasting service as will serve public interest, convenience, or necessity to the full extent of the privileges herein conferred.

This license shall not vest in the licensee any right to operate the station nor any right in the use of the frequency designated in the license beyond the term h'reof, nor in any other manner than authorized herein. Neither the license nor the right granted hereunder shall be assigned or otherwise transferred in violation of

the Communications Act of 1934. This license is subject to the right of use or control by the Government of the United States conferred by section 606 of the Communications Act of 1934.

Dated this 31st day of October 1946.

By direction of the Federal Communications Commission,

[SEAL] T. J. SLOWIE, *Secretary.*

U. S. Government Printing Office 16—3976.

* * * * *

35 Before the Federal Communications Commission

File No. B3–P–4891

IN RE APPLICATION OF TARBORO BROADCASTING COMPANY, INC., TARBORO, NORTH CAROLINA, FOR CONSTRUCTION PERMIT

*Decision and order on petition for reconsideration*

By the Commission:

The Commission has before it a petition for reconsideration filed September 10, 1946, by WJR, The Goodwill Station, Inc., licensee of Radio Station WJR, which is a Class I–A station operating on 760 kc., with 50 kw. power, unlimited time, at Detroit Michigan, directed against the Commission's action of August 22, 1946, granting without hearing the application of Tarboro Broadcasting Company, Inc., for a construction permit to erect a new standard broadcast station to operate on 760 kc., with 1 kw. power, daytime only (Class II), at Tarboro, North Carolina (File No. B3–P–4891). On October 18, 1946, Tarboro Broadcasting Company, Inc., filed an opposition to the petition.

The petition requests the Commission to reconsider its action and designate for hearing the application of Tarboro Broadcasting Company, Inc., making the petitioner a party to the hearing, or, in the alternative, "to hold in abeyance any grant of such application pending a decision in the Clear Channel case, Docket No. 6741." In support of these requests, the petitioner contends that the proposed operation of the Tarboro Broadcasting Company, Inc. station will cause objectionable interference to the present interference-free service area of Station WJR in all of upper Michigan and in twelve counties in lower Michigan; that the "FCC Radio Survey, July, 1945," Volume III, Part 1—Tables 1—17, shows that Station WJR is the most listened to station,

36 both day and night, in the "Cutover" region in which the interference area is located, and that, therefore, a substantial number of listeners in this area now depending upon Station WJR's service will be deprived of such service through the operation of the proposed Tarboro station; that the grant of the Tar-

boro application may make it difficult or impossible to determine in the Clear Channel hearing whether the present power and service area of Station WJR should be increased. The opposition to the petition states that the petitioner does not allege interference within the normally protected service area of Station WJR; that the allegation of interference is not supported by proof of the existence of such service; and that other stations now and in the future will serve the interference area described by the petitioner.

Station WJR is a Class I–A station. Under the Commission's Rules and Standards, Class I–A stations are normally protected daytime to the 100 microvolt-per-meter contour. The area sought by petitioner to be protected is, according to the engineering affidavit accompanying the petition, served by Station WJR during the daytime with a signal intensity of 32 microvolts-per-meter or less, and is therefore outside the normally protected contour.[1]

Interpreting the alternative prayer of the petition, "to hold in abeyance any grant of such application pending a decision in the Clear Channel case, Docket No. 6741," to be a request to have the Commission set aside the grant made on August 22, 1946, to Tarboro Broadcasting Company, Inc., and to place the application in the pending files, we are impelled to deny it. The

37

Tarboro application complied with the requirements of the Communications Act of 1934, as amended, and with the Rules and Regulations and Standards established by the Commission. The application complied, more particularly, with Section 3.25 (a) of the Rules and with the policy announced in the Public Notice of June 21, 1946 (Mimeo. No. 95034), governing allocation of Class II stations to Class I–A frequencies. We conclude that it would not serve the public interest to set aside the grant and withhold action on this application, which complies in every respect with the Rules and policy of the Commission, and which proposes a new service to 274,307 persons in an area of 4,540 square miles, because of the possibility that the grant might affect the future assignment of facilities of Station WJR upon the termination of the Clear Channel hearing.

Reconsidering the application of Tarboro Broadcasting Company, Inc., in the light of the petition for reconsideration and hearing, and the opposition thereto, we find no reason to set aside or modify our action of August 22, 1946, granting the application.

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[1] No question is here raised as to the applicability of the following provision of the Standards of Good Engineering Practice Concerning Standard Broadcast Stations (Page 4):

"When it is shown that primary service is rendered * * * beyond the normally protected contour, and when primary service to approximately 90 percent of the population * * *, of the area between the normally protected contour and the contour to which such station actually serves, is not supplied by any other station or stations carrying the same general program service, the contour to which protection may be afforded in such cases will be determined from the individual merits of the case under consideration."

Accordingly, it is ordered, this 17th day of December 1946, that the petition for reconsideration filed by WJR, The Goodwill Station, Inc. (WJR), Detroit, Michigan, be, and it is hereby, denied.

FEDERAL COMMUNICATIONS COMMISSION.

* * * * *

Federal Communications Commission

Docket No. 6741

In the Matter of CLEAR CHANNEL BROADCASTING IN THE STANDARD BROADCAST BAND

*Petition for reconsideration*

The Clear Channel Group, by its attorney, hereby petitions the Commission as follows:

38 1. To reconsider its action of June 21, 1946, whereby it adopted a policy of considering on "their individual merits" applications involving use of 1-A channels, daytime or limited time, where the proposed station is 750 miles or less from the dominant 1-A station using a nondirectional antenna on the frequency requested or is within the 500 microvolt per meter 50% skywave contour of the dominant class 1-A station using a directional antenna and of granting such applications conditionally for daytime operation only; and to hold in abeyance action on all such applications pending final decision of the issues herein; or in the alternative, to designate such applications for hearing.

In Support Whereof petitioner states:

2. Since the announcement of the June 21st policy, the Commission has granted eleven new applications for use of 1-A channels, daytime only, as follows:

(B3-P-4863) Bay Broadcasting Company, Goose Creek, Texas; for 650 kc., 250 watts, daytime only; granted August 29, 1946.

(B2-P-4966) Southern Virginia Broadcasting Corp., Crewe, Virginia; for 650 kc., 1 kw., daytime only, granted September 19, 1946.

(B2-P-3670) Altoona Broadcasting Co., Altoona, Pa.; for 650 kc., 250 watts, daytime only, granted September 30, 1946.

(B3-P-4699) Greenville Broadcasting Co., Greenville, South Carolina; for 660 kc., 5 kw., daytime only, granted August 7, 1946.

(B3-P-4891) Tarboro Broadcasting Co., Tarboro, North Caroline; for 760 kc., 1 kw., daytime only; granted August 22, 1946.

(B3-P-4426) Stillwater Publishing Co., Stillwater, Okla.; for 840 kc., 250 watts, daytime only; granted August 1, 1946.

(B3–P–3745, Docket 6880) Pursley Broadcasting Service, Mobile, Alabama; for 840 kc., 1 kw., daytime only; granted June 21, 1946.

39 (B3–P–4886) Variety Broadcasting Co., Dallas, Texas; 1040 kc., 1 kw., daytime only; granted August 7, 1946.

B1–P–4928) Broadcasting Management, Inc., Bethesda, Md., for 1120 kc., 250 watts, daytime only; granted September 12, 1946.

(B3–P–4882) The Voice of Thomaston, Thomaston, Ga.; for 1120 kc., 250 watts, daytime only; granted October 3, 1946.

(B2–P–4894) Lake Huron Broadcasting Co., Saginaw, Michigan; for 1210 kc., 1 kw., daytime only; granted August 22, 1946.

3. In addition, the Commission has granted fourteen new applications for use of 1–B channels as follows:

(B3–P–4963) Coosa Valley Radio Co., Rome, Ga.; 710 kc., 1 kw., daytime only; granted September 19, 1946.

(B3–P–4167, Docket 7161) The Times Picayune Publishing Co., New Orleans, La.; 940 kc., 1 kw., daytime; granted September 12, 1946.

(B3–P–4642) Goggan Radio Sales, Henderson, Texas; 1000 kc., 250 watts, daytime only; granted August 9, 1946.

(B4–P–4654) Belleville Broadcasting Co., Belleville, Ill.; 1060 kc., 250 watts, daytime only; granted August 2, 1946.

(B2–P–4023) Palladium Publishing Co., Benton Harbor, Mich.; 1060 kc., 1 kw., daytime only; granted July 11, 1946.

(B3–P–4884) Alice Broadcasting Co., Alice, Texas; 1070 kc., 1 kw., daytime only; granted August 1, 1946.

(B3–P–4199, Docket 7533) The High Point Enterprise, Inc., High Point, N. C.; 1070 kc., 1 kw., daytime only; granted September 5, 1946.

(B3–P–4514, Docket 7451) W. Walter Tison, Tampa, Florida; 1110 kc., 1 kw., daytime only; granted July 18, 1946.

(P5–P–4785) Radio Diruba Co., Diruba, Calif.; 1130 kc., 250 watts, day; granted July 18, 1946.

(B5–P–4669) Silver Gate Broadcasting Co., San Diego, Calif., 1130 kc., 250 watts, day; granted July 11, 1946.

40 (B3–4952) Alfred Achilles Corcanges, Mineral Wells, Texas; 1140 kc., 250 watts, day; granted September 12, 1946.

(B2–P–4852) The Adrian Broadcasting Co., Adrian, Mich., 1500 kc., 250 watts, day; granted August 7, 1946.

(B3–P–4977) Rome Broadcasting Co., Rome, Ga., 1190 kc., 1 kw., daytime only; granted September 19, 1946.

(B4–P–4833) W-A-U-K Broadcasting Co., Waukeska, Wis.; 1510 kc., 250 watts, day; granted July 25, 1946.

(B1–P–3277) Eastern Broadcasting Co., Inc., Oyster Bay, Long Island, New York; 1520 kc., 250 watts, daytime only; granted September 19, 1946.

4. Furthermore, since the announcement of the policy, the Commission has granted numerous applications for use of channels adjacent to 1–A and 1–B frequencies.

5. There are now pending before the Commission a large number of applications requesting facilities on or adjacent to 1–A and 1–B channels, similar to those which the Commission has already granted.

6. Among the issues to be determined in the proceedings herein is whether or not higher power should be authorized on clear channels. The Commission's policy announcement of June 21, 1946, referred to above, was not accompanied by any statement of the reasons for the adoption of such policy, or for making a distinction between daytime stations located less, and daytime stations located more, than 750 miles from the dominant station. Nor was there any explanation as to what "individual merits" would warrant daytime duplication on 1–A channels. Moreover, no policy was announced respecting assignments on 1–B channels or assignments on channels adjacent to 1–A and 1–B frequencies.

7. There was no indication that the Commission's policy announcement was intended to be a decision on any of the issues herein. However, the specific grants referred to above made since June 21, 1946 and the grant of others like them, may have the force and effect, among other things, of making more difficult the
41 grant of increased power to Clear Channel stations. Actions adversely affecting the proper determination of such an important broad issue, through the granting of specific applications prior to a consideration of all the evidence already presented and to be presented in further proceedings herein, are or may be ill-advised and contrary to public interest, convenience or necessity.

8. The above entitled proceeding has been in process since February 1945 and, during the intervening period, technical committees established by the Commission, headed by members of the Commission's engineering staff and comprising the leading technical experts in the country on broadcast allocation engineering, have undertaken comprehensive investigations and studies, and have made reports. These investigations, studies, and reports have involved great expenditures of time and money on the part both of the Commission and of all important groups in the industry. Hearings have been held from time to time since January 1946, but the final and more important portion of the hearing has not yet been held, in which it will or may be determined whether and to what extent, and in what manner, to give effect to the expert findings of the technical committees. Premature granting of daytime station applications such as those under dis-

cussion seems certain to make more difficult and perhaps even to foreclose, giving proper effect to said findings.

9. Petitioner intends to show in further proceedings herein that greatly increased power should be permitted on a large number of clear channels, including some channels now classified as 1–B. The Commission's actions referred to above run the danger of prejudicing petitioner's case in this respect and of increasing the problems and obstacles which have to be overcome by the Commission in providing improved service to rural areas and the smaller cities and towns not now having adequate service.

10. At the hearing on July 2, 1946, in this proceeding, petitioner's counsel stated orally the objections of petitioner
42 to the Commission's announced policy and the Commission, through the Chairman, stated that the protest would be taken under advisement (R. 3625–3626). To date, however, there has been no announcement of any decision of the Commission on the protest, except to the extent that the individual grants referred to above may be interpreted as a decision on this matter.

Wherefore, petitioner requests the Commission to take the action set forth in paragraph 1 above.

Respectfully submitted.

CLEAR CHANNEL GROUP,
By LOUIS G. CALDWELL, *Its Attorney.*

* * * * *

## Federal Communications Commission

In the Matter of PETITION OF CLEAR CHANNEL GROUP FOR RECONSIDERATION OF THE COMMISSION'S POLICY WITH RESPECT TO LICENSING OF STATIONS ON CLEAR CHANNELS AND CHANNELS ADJACENT TO CLEAR CHANNELS

*Memorandum opinion*

This matter comes before the Commission on a petition filed by the Clear Channel Group on October 8, 1946, requesting the Commission to reconsider its policy with respect to the licensing of stations to operate on clear channels and on channels adjacent to clear channels.* Pursuant to this policy the Commission has dismissed all applications requesting permission to operate full-time on any I–A channel or to operate on such channels with power in excess of 50 kilowatts. The Commission has also, pursuant to this policy, placed in the pending files all appli-
43 cations for daytime operation on a I–A channel where the proposed station is more than 750 miles from the dominant station using a nondirectional antenna or is beyond the 0.5 milli-

*On November 13, 1946, the Commission announced that it had denied the instant petition and that an opinion setting forth the Commission's reasons would be issued at a future date.

volt per meter 50% skywave contour of the dominant Class I–A station using a direction antenna on the frequency requested. Application for daytime operation on I–A stations within a lesser distance and all other applications are considered by the Commission on their merits.

The petition points out that under the foregoing policy the Commission has granted numerous applications for daytime operation on I–A channels and for stations on channels adjacent to I–A and I–B frequencies and that there are many such applications still pending before the Commission. The petition further points out that the order in the clear channel hearing (Docket No. 6741) places in issue the possibility of a revision of the Commission's present rules limiting maximum power to 50 kilowatts. According to the petition the licensing of daytime stations on I–A channels or the licensing of stations on channels adjacent to clear channels may have the effect "of making more difficult the grant of increased power to clear channel stations."

The Commission is of the opinion that a grant of the instant petition would not be in the public interest. If the petition were granted, it would mean that no action could be taken on any application for operation on the frequencies 610 kc. to 1590 kc. since all of these frequencies are either I–A channels or are adjacent (within 30 kc.) to I–A channels. The net result would be to preclude the Commission to a very large extent from exercising its licensing functions.

Nor is there any valid reason for withholding action on those applications requesting authority to operate on clear channels in accordance with the Commission's policy. These applications are consistent with the Commission's Rules and Regulations and fulfill a definite public need. Thus, a review of the Commission's records discloses that since October 8, 1945—the date on
44 which the Commission resumed its normal licensing following the lifting of the wartime freeze—48 construction permits for new stations have been issued for daytime operation on I–A channels and 55 construction permits for new stations have been issued for operation on I–B channels, almost all of the latter being for daytime operation. Of these 103 construction permits which have been granted, more than half (53) have been in cities having no other standard broadcast station. With the difficulty of finding room in the standard broadcast band for additional stations, it is apparent that cities without any service or with inadequate service must rely to a very large extent on daytime stations which are licensed to operate on clear channels.

Moreover, a review of the applications for daytime operation on clear channels shows that many of these applicants are also

desirous of entering FM broadcasting and are utilizing their daytime operation in helping them finance their operation during the transition period until FM becomes firmly established. In the Commission's opinion, this assistance to the establishment of FM broadcasting is in the public interest and is an additional reason for denying the relief requested.

The denial of the petition of the Clear Channel Group will not, in the Commission's opinion, adversely affect the outcome of the clear channel hearing. The Commission has already announced that no applications will be accepted for nighttime operation on a I–A channel until after the conclusion of the clear channel hearing; hence there is no possibility of any I–A channel being duplicated nighttime before the clear channel hearing is concluded.

So far as the possibilities of higher power are concerned, the Commission's present policy will not operate as a bar if the Commission determines to amend its rules and allow higher power. Applications for stations on I–A channels more than 750 miles from the dominant stations are placed in the pending files in accordance with the Commission's policy. Applications for stations within 750 miles of the dominant I–A station must be designated for hearing if they involve interference to the normally protected contour of the I–A station. Hence, there is only a very limited area where daytime stations can be placed so far as I–A channels are concerned.

It is of course recognized that any increase in power of existing I–A stations or the relocation of such stations may result in interference to the normally protected contour of such stations from the new daytime stations, where none exists today. However, the same situation may arise with respect to existing stations. Problems of relocation are bound to be very difficult in any event. The addition of new stations may make it somewhat more difficult. However, when it is remembered that it will always be easier to find room for daytime stations than for fulltime stations, it should not by any means prove to be insuperable to find assignments for those daytime stations in existence at the conclusion of the clear channel hearing, if a reallocation proves to be necessary.

There remains the problem involved in possible skywave interference during the daytime. Under the present Rules and Regulations and Standards of Good Engineering Practice, no station is protected against skywave interference during the daytime. If the power of existing I–A stations is raised substantially, it may very well be that daytime skywave interference will become a problem that should be dealt with in the Rules and Regulations or Standards of Good Engineering Practice. However, it should be pointed out that this will be true for existing daytime stations

as well as for new stations; the problem therefore is not created by the licensing of the new stations. Moreover, the clear channel hearing includes an issue concerning possible revision of the rules and regulations governing the hours of operation of daytime stations on clear channels. Under this issue all relevant evidence can be introduced by petitioner as well as other interested persons concerning daytime skywave interference and the desira-
46 bility of revising Commission rules for operation of daytime stations. Any grants that are made to daytime stations are subject to whatever changes in the rules may be made as a result of the clear channel hearing.

For the foregoing reasons the petition of the Clear Channel Group is denied.

FEDERAL COMMUNICATIONS COMMISSION.
T. J. SLOWIE, *Secretary.*

Adopted: January 2, 1947.

* * * * *

46–A SS–575. Interview Sample

DEPARTMENT OF COMMERCE—BUREAU OF THE CENSUS
FCC RADIO SURVEY

TABLE 15–S.—*Households reporting specific class IA stations heard and percent hearing these without trouble, day (Q. 4) and night (Q. 5)*

CUTOVER REGION

| Call letters | Households reporting stations heard during— | | | |
|---|---|---|---|---|
| | Day | | Night | |
| | Total number | Percent hearing without trouble | Total number | Percent hearing without trouble |
| KDKA | 27 | 0 | 298 | 88 |
| KMOX | 912 | 22 | 1,333 | 79 |
| WABC | | | 141 | 100 |
| WBAP | | | 654 | 100 |
| WBBM | 13,966 | 28 | 19,394 | 63 |
| WBZ | | | 8 | 100 |
| WCCO | 50,007 | 67 | 47,283 | 71 |
| WEAF | | | 8 | 100 |
| WENR | 6,882 | 53 | 9,930 | 83 |
| WFAA | | | 698 | 100 |
| WGN | 42,805 | 48 | 62,601 | 72 |
| WHAM | 654 | 0 | | |
| WHAS | 141 | 0 | 537 | 74 |
| WHO | 23,507 | 84 | 26,482 | 88 |
| WJR | 74,240 | 83 | 77,328 | 89 |
| WLS | 33,699 | 45 | 42,635 | 57 |
| WLW | 5,232 | 35 | 7,408 | 44 |
| WMAQ | 15,180 | 75 | 16,898 | 74 |
| WSB | 885 | 0 | 1,140 | 100 |
| WSM | 5,749 | 16 | 18,608 | 44 |
| WTAM | 465 | 4 | 515 | 31 |
| WWL | | | 557 | 100 |

46–B SS–575 Interview Sample

DEPARTMENT OF COMMERCE—BUREAU OF THE CENSUS
FCC RADIO SURVEY

TABLE 16–8.—*Households reporting specific class IB stations heard and percent hearing these without trouble, day (Q. 4) and night (Q. 5)*

CUTOVER REGION

| Call letters | Households reporting stations heard during— | | | |
|---|---|---|---|---|
| | Day | | Night | |
| | Total number | Percent hearing without trouble | Total number | Percent hearing without trouble |
| KOA | 730 | 100 | 4,303 | 100 |
| KSTP | 15,765 | 32 | 12,304 | 56 |
| WCFL | 194 | 10 | 19 | 100 |
| WJZ | 718 | 0 | 718 | 48 |
| WOWO | 576 | 3 | 557 | 0 |
| WRVA | 288 | 0 | 141 | 10 |

46–C SS–575 Interview Sample

DEPARTMENT OF COMMERCE—BUREAU OF THE CENSUS
FCC RADIO SURVEY

TABLE 17–8.—*Households reporting specific class II stations heard and percent hearing these without trouble, day (Q. 4) and night (Q. 5)*

CUTOVER REGION

| Call letters | Households reporting stations heard during— | | | |
|---|---|---|---|---|
| | Day | | Night | |
| | Total number | Percent hearing without trouble | Total number | Percent hearing without trouble |
| KUOM | 490 | 71 | 141 | 0 |
| WAIT | 19 | 100 | 19 | 100 |
| WBZA | | | 8 | 100 |
| WCAL | 1,003 | 65 | 1,003 | 65 |
| WCAR | 1,184 | 57 | 510 | 0 |
| WDGY | 6,083 | 46 | 3,089 | 54 |
| WHN | 255 | 0 | | |
| WJJD | 5,716 | 23 | 11,669 | 42 |
| WJW | 347 | 0 | | |
| WKAR | 20,895 | 76 | 6,943 | 65 |
| WMBI | 576 | 50 | | |
| WOI | 2,667 | 95 | 208 | 100 |
| WPAG | 885 | 100 | | |



46–D RELATIVE SIGNAL INTENSITIES FOR ATMOSPHERICS-FREE RECEPTION VS. FREQUENCY

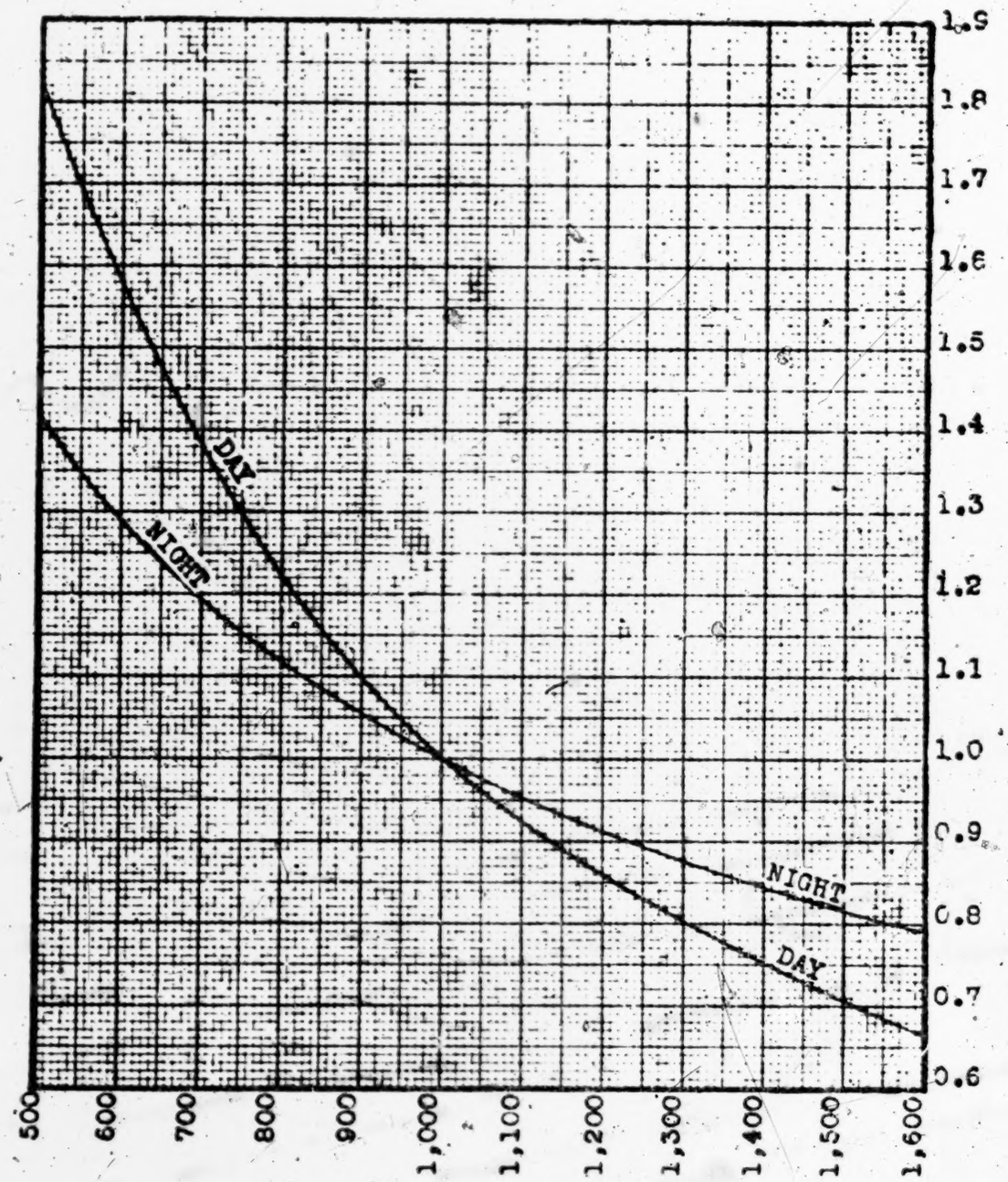


FIGURE 4–1

46–E

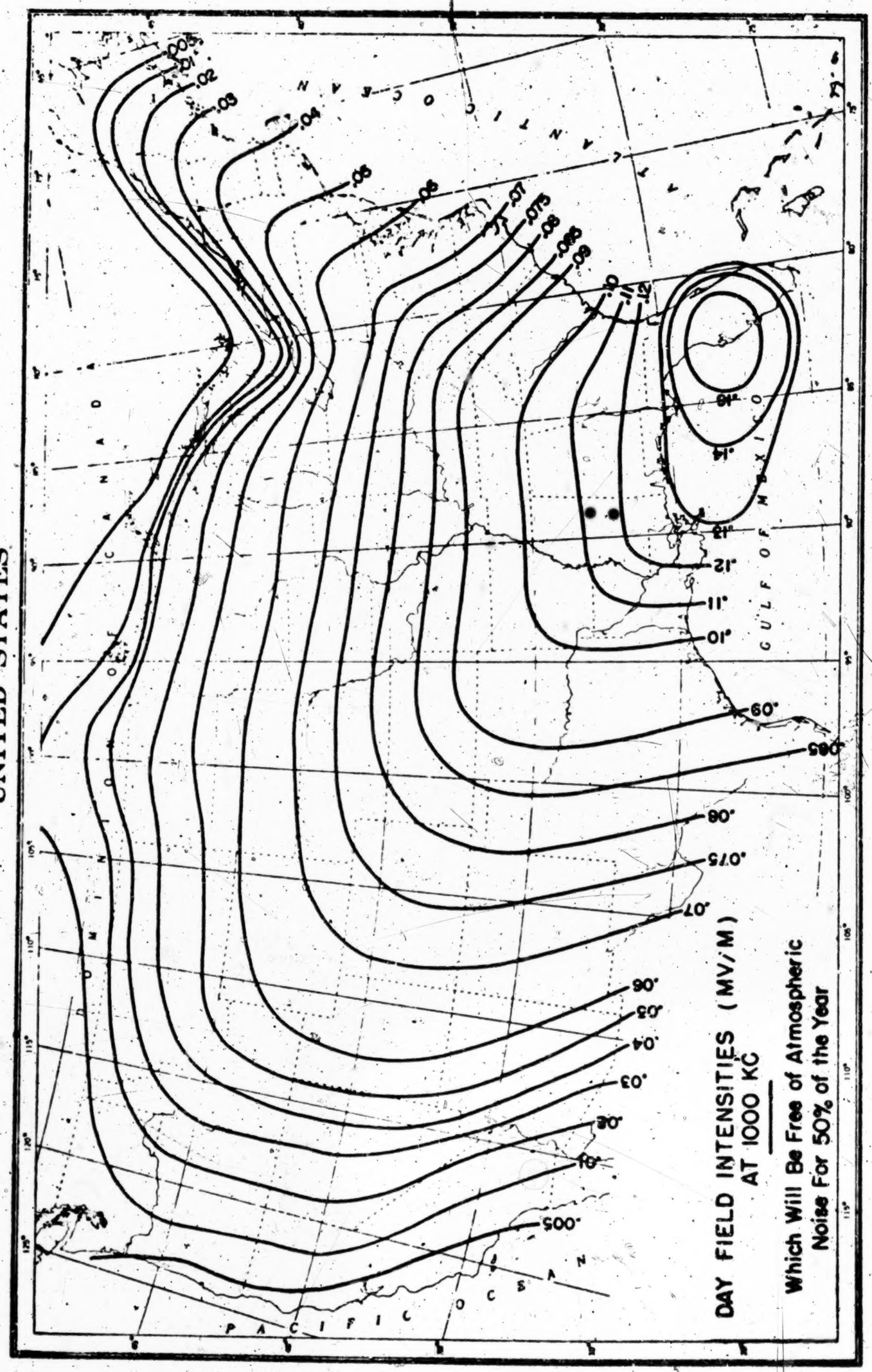


FIGURE 12–3

47 37

47 United States Court of Appeals, for the District of Columbia Circuit

WASHINGTON 1, D. C.

JOSEPH W. STEWART, *Clerk*.

May 22, 1947.

*No. 9464, WJR, the Good Will Station* v. *F. C. C.*

DEAR SIR:

The above entitled case has been set down for rehearing on June 11, 1947, at 10:30 A. M. Thirty minutes will be allowed on each side for argument.

It is the desire of the Court that the case be reargued on all points.

*The court in particular requests, however, the presentation of argument and authorities in respect of the effect of the Communications Act, the rules and regulations of the Commission, and the due process clause of the Fifth Amendment upon the claimed right of hearing before the Commission upon the question whether the grant of the new application will operate as a modification of the existing license.*

Very truly yours,

JOSEPH W. STEWART,
*Clerk*.

LOUIS C. CALDWELL, *Esquire*,
REED T. ROLLO, *Esquire*,
PERCY H. RUSSELL, JR., *Esquire*,
KELLEY E. GRIFFITH, *Esquire*,
*914 National Press Building,*
*Washington 4, D. C.*

*Filed Oct. 7, 1948. Joseph W. Stewart, Clerk*

No. 9464

WJR, THE GOODWILL STATION, INC., APPELLANT,

*v.*

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE,
COASTAL PLAINS BROADCASTING COMPANY, INC., INTERVENER

*Appeal from the Federal Communications Commission*

Reargued June 11, 1947* Decided October 7, 1948

*Mr. Kelley E. Griffith*, with whom *Messrs. Louis G. Caldwell, Reed T. Rollo* and *Percy H. Russell, Jr.*, were on the brief, for appellant.

*Mr. Max Goldman*, Attorney, Federal Communications Commission, with whom *Mr. Benedict P. Cottone*, General Counsel, *Mr. Harry M. Plotkin*, Assistant General Counsel, and *Mr. Paul Dobin*, Attorney, Federal Communications Commission, who entered appearances, were on the brief, for appellee.

*Mr. Frank U. Fletcher*, who entered an appearance, for intervener.

*Mr. Robert T. Barton, Jr.*, who was permitted to argue as *amicus curiae*, urged affirmance.

Before STEPHENS, EDGERTON, CLARK, WILBUR K. MILLER and PRETTYMAN, *Associate Justices*.

STEPHENS, *Associate Justice*: This is an appeal by WJR, The Goodwill Station, Inc. (hereafter referred to as WJR), from a decision of the Federal Communications Commission of August 22, 1946, granting without hearing the application of the Coastal Plains Broadcasting Company, Inc., the intervener herein (hereafter referred to as Coastal Plains), for a construction permit to erect a new standard broadcast station.[1] WJR seeks relief also in the appeal from a decision and order of the Commission of December 17, 1946, denying without hearing the appellant's petition for reconsideration of the Commission's decision of August 22, 1946.

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* Originally argued March 13, 1947, before Groner, Chief Justice, and Clark and Prettyman, Associate Justices; reargued by direction of the court before Stephens, Edgerton, Clark, Wilbur K. Miller and Prettyman, Associate Justices, June 11-12, 1947.

[1] The application for the permit was made by, and the permit was granted to, the Tarboro Broadcasting Company, Inc., but before this appeal was taken that company changed its name to Coastal Plains Broadcasting Company, Inc.

Station WJR, located in Detroit, Michigan, is a Class I-A clear channel station with non-directional antenna, licensed by the Commission to broadcast without time limit on an assigned frequency of 760 kilocycles with 50 kilowatts power, the maximum power with which any station may operate under Section 3.22 of the Commission's Rules and Regulations (hereafter referred to as rules). In 1945 in response to the request of several Class I-A stations for increases in authorized power and in response to the requests of other parties for new stations to operate on Class I-A channels, the Commission instituted a rule making proceeding called the "Clear Channel Hearing." This hearing, as characterized by the Commission in its order for the same, was for the purpose, among other things of determining "What minimum power and what maximum power should be required or authorized for operation on clear channels" and "Whether and to what extent the authorization of power for clear channel stations in excess of 50,000 watts [50 kilowatts] would unfavorably affect the economic ability of other stations to operate in the public interest." During the pendency of this Clear Channel Hearing the Commission on June 21, 1946, announced a policy of considering on their individual merits applications involving use of I-A channels, daytime or limited time, where the proposed station is 750 miles or less from the dominant I-A station using a non-directional antenna on the frequency requested. It was pursuant to this policy that the Commission on August 22, 1946, granted the application of Coastal Plains for a permit to construct a radio station. This station was to be located at Tarboro, North Carolina, for operation with 1 kilowatt power daytime only on a 760 kilocycle frequency, to wit, the same frequency as that on which, as above stated, WJR operates.

Pursuant to Section 405 of the Communications Act, 47 U. S. C. § 151, *et seq.* (1946), WJR filed with the Commission a petition for reconsideration of the decision of August 22, 1946. Therein it requested that the Coastal Plains application be designated for a hearing before the Commission in which WJR could participate. WJR alleged that its present interference-free service area would be subjected to objectionable interference by the operation of the Coastal Plains station. An engineering affidavit filed in support of the petition stated that the service of WJR would be interfered with between 10 a.m. and 2 p.m. in all of upper Michigan and in several counties or fractional parts of counties in lower Michigan, an area in which the field intensity of WJR averages 32 microvolts per meter or less during daytime hours, and stated further that in much of this region WJR provided the best signal available. WJR's petition alleged also that the "FCC Radio Survey, July 1945," a part of the record in the Clear Channel Hearing, showed it was the

most listened to station in the areas of Michigan above mentioned. In effect WJR's petition asserted that granting the Coastal Plains application would constitute an indirect modification of WJR's license. As an alternative to its prayer for a hearing WJR requested that action on the Coastal Plains application be deferred until the conclusion of the Clear Channel Hearing, asserting as a foundation for this alternative request that if the Commission as a result of the Clear Channel Hearing should amend its rules so as to permit clear channel stations to operate with increased power, a prior grant of the Coastal Plains application would make it difficult for the Commission to grant any increase to WJR.

50 Coastal Plains filed with the Commission an opposition to the petition of WJR. The opposition was, so far as here pertinent, in effect what in common law terms is a demurrer, and under modern practice a motion to dismiss; that is to say, the opposition raised the question whether or not the allegations in the petition, assuming their truth, showed that the operation of the Coastal Plains station would cause objectionable interference to WJR within its normally protected contour and service area as defined by the Commission's rules and Standards of Good Engineering Practice (hereafter referred to as standards).

By its decision and order of December 17, 1946, the Commission denied without a hearing of any kind WJR's petition for reconsideration. In so ruling it treated the petition as if on demurrer. In its decision the Commission ruled that WJR was not entitled to be heard in respect of the application of Coastal Plains for the reason that under the Commission's rules and standards WJR as a Class I-A station was normally protected daytime to the 100 microvolt per meter contour, and that the area which it sought to have protected by virtue of its petition and supporting affidavit was served during the daytime with a signal intensity of 32 microvolts per meter or less and was therefore outside the normally protected contour. With reference to the alternative request of WJR, the Commission ruled that it would not serve the public interest to refuse licenses on Class I-A frequencies to Class II stations such as Coastal Plains because of the possibility that the Commission might determine in the Class Channel Hearing that the power of Class I-A stations should be increased.

The questions for decision in the appeal are: I. Whether in accordance with WJR's alternative prayer action on the Coastal Plains application should be deferred until conclusion of the Clear Channel Hearing. II. If the answer to this question is in the negative, is WJR entitled to a hearing before the Commission as to the sufficiency of the allegations of its petition, assuming their truth, to show indirect modification of its license by the granting of the Coastal Plains application. III. If the answer to this question is in the affirmatiye, *i.e.*, if the Commission erred in its denial

of such a hearing, may this court nevertheless rule upon the question whether the decision of the Commission—that the allegations of WJR's petition, assuming their truth, do not show an indirect modification of its license by the granting of the Coastal Plains application—was correct. IV. Whether WJR's prayer for hearing fails to request the hearing for which it contends on this appeal and whether this failure forecloses WJR's right to such a hearing.

I

Should the Commission's action on the Coastal Plains application be deferred, in accordance with WJR's alternative prayer, until the conclusion of the Clear Channel Hearing: The answer to this question is in the negative. It is true that if as a result of the Clear Channel Hearing WJR's power were increased substantially above its 50 kilowatt authorization, its 100 microvolt per meter contour would be correspondingly increased and the operation of the Coastal Plains station might then cause interference within that protected area. But there are two difficulties with WJR's
51 contention in this aspect of the case. First, to sustain WJR's contention it must be assumed (1) that the Commission will amend its rules so as to permit clear channel stations to operate with increased power; (2) that WJR will itself be granted an increase in power and that the resultant protected area under its license will be sufficiently extensive to include the area in which the operation of the Coastal Plains station will cause objectionable interference within the rules and standards of the Commission. WJR has no present rights in these suppositious eventualities. Second the contention of WJR would require this court to direct the order in which the Commission shall consider its cases. This we cannot do. If by reason of procedural malarrangement the Commission commits error in the disposition of a given case that error can be considered as can any other. But this court cannot direct in advance the order of precedence in the Commission's calendar.

II

Preliminarily it is to be noted that in such cases as this case and *L. B. Wilson, Inc.* v. *Federal Communications Commission*, No. 9434, decided by this court April 12, 1948, hereafter referred to as the *Wilson case*, there are two principal issues. The first is whether the operation of the applicant station (such as Coastal Plains) will cause "objectionable interference" to the outstanding station (such as WJR) within its "protected contour" (within the technical meaning of the quoted terms under the Communications Act and the rules and standards of the Commission), *i.e.*, whether there will result from the granting of a permit to the applicant station an indirect modification of the outstanding station's license.

The second issue, which arises only upon an affirmative answer to the first, is whether the public interest, convenience and necessity (hereafter referred to as public interest) require this interference, *i.e.*, this indirect modification of the outstanding license. No hearing need be held on the second issue—no determination thereof need be made—unless the first issue is determined in the affirmative. But if the first is determined in the affirmative, then there must be a hearing on the second—this under the ruling in *Federal Communications Commission* v. *National Broadcasting Co., Inc.* (KOA), 319 U. S. 239 (1943) (hereafter referred to as the KOA case). In determining the answer to the first principal issue the Commission may deal separately with two questions, one of law, the other of fact: In dealing with the first question the Commission will determine whether or not the petition of the outstanding station (requesting a hearing as to the propriety of the grant of a license to the applicant station) alleges facts which if true "show" that objectionable interference within the protected contour of the outstanding station will be caused by operation of the applicant station. This is a question of law to be answered in terms of the Communications Act, the Commission's rules and standards, and pertinent judicial decisions. In determining this question first the Commission is in effect treating the petition of the outstanding station as if on demurrer.[2] If this question is answered in the negative,
52 the petition may be dismissed and there need be no determination of the second principal issue whether or not public

[2] It is pointed out in the Wilson case that the Commission may at the threshold of consideration of an issue modification *vel non* of an outstanding license by the proposed operations of another station treat that issue as if on demurrer and thereby avoid the necessity of hearing proof of the truth of allegations of objectionable interference if as a matter of law they do not "show" such interference within the Commission's rules and standards.

It is to be noted that in the *Wilson* case there was before the Commission a question of fact and a question of mixed fact and law. This was because the petition for reconsideration in that case alleged that according to physical data within the Commission's files there would be objectionable interference to the outstanding station by the operation of the applicant (Stanton) station. In court procedure such an allegation would have been subject to a bill of particulars to bring this physical data to the face of the petition and then on demurrer the question of law whether, under the allegations of the petition, including this physical data, objectionable interference was "shown" would have been determined. But nothing equivalent to a bill of particulars appearing to exist in the Commission's practice, it was necessary to rule in the *Wilson* case that there must be a hearing on the petition as to all the questions presented, whether of law, fact, or mixed fact and law. In the instant case the question presented by the Coastal Plains opposition to the petition of WJR for reconsideration is one of law alone.

interest requires indirect modification of the outstanding license: if the allegations of the petition, assuming their truth, do not "show" objectionable interference to the outstanding license within its protected contour their truth is immaterial since not even on the fact of the allegations will there be an indirect modification of the outstanding license within the meaning of the decision of the Supreme Court in the KOA case; hence there will be no need of a hearing under the KOA decision on the issue whether or not the public interest requires such a modification. But if the question of law as to the sufficiency of the allegations to show objectionable interference is answered in the affirmative, then the Commission must determine the question of fact as to the truth of the allegations of the petition (if the applicant station disputes their truth) and in so doing must hold a hearing at which the petitioner—the outstanding station—shall be allowed to introduce evidence of the truth of the allegations and the applicant station evidence to the contrary if it desires. If the facts alleged are found not to be true then again no hearing on the second principal issue which arises in this class of cases, i.e., whether public interest requires the indirect modification of the outstanding license, need be held since the allegations of objectionable interference will not have been proved. But if the facts alleged are found to be true, a hearing on the second principal issue will be requisite under the KOA decision. On all of the foregoing the members of this court are in agreement.

The principal point of contention in the instant case—and the only point of division within the court as reflected by this opinion and the minority opinion is on the question whether or not the determination of the point of law above described can properly be made without a hearing. In terms of the instant case, can the Commission without a hearing determine whether the allegations of the petition of WJR, assuming their truth, do "show" objectionable interference within WJR's protected contour by the operation of the applicant station, Coastal Plains. It is the contention of the Commission that it can decide that question *ex parte*, *i.e.*, without giving WJR an opportunity to argue orally, an opportunity to try to convince the Commission that the allegations of its petition do, assuming their truth, "show" objectionable interference. In

53

support of this position of the Commission, the minority view in this court is that unless the Commission itself *ex parte* thinks that there is a substantial question as to the sufficiency of the allegations of the petition to show objectionable interference, no hearing on that question need be held. Generalizing the minority view, it is apparently this: Until he has alleged some fact which indicates a threatened damage to or modification of some existing right, or facts which at least present a substantial question in that respect, a person has not established a right to a hearing. It is the

view of the majority that due process of law, as guaranteed by the Fifth Amendment, requires a hearing, including an opportunity to make oral argument, on every question of law raised before a judicial or quasi-judicial tribunal, including questions raised by demurrer or as if on demurrer, except such questions of law as may be involved in interlocutory orders such as orders for the stay of proceedings *pendente lite*, for temporary injunctions and the like. A ruling upon a demurrer is obviously not interlocutory for if the demurrer is sustained the pleader's cause (or defense) is dismissed upon the merits; if the demurrer is overruled, the opposite party is put to a trial and the machinery of the tribunal is set in motion.

54 It has been so long taken for granted by courts that the due process clause guarantee of hearing before decision includes hearing upon questions of law as well as upon questions of fact, and it has been so long taken for granted that hearings on questions of law include hearings on such questions arising under demurrers, and the practice of courts to grant such hearings has been of such long standing; that there is little authority concerning the requirements of due process in these respects. There has been no need for litigants to obtain rulings in support of the right of hearing on questions of law when opportunity to be heard on such questions has not been denied. *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581 (U. S. 1819) (Webster's argument), and *Galpin* v. *Page*, 18 Wall. 350, 368 (U. S. 1873), cited in the *Wilson* case, sufficiently attest that an essential element of due process is an opportunity to be heard before the reaching of a judgment, that judgment without opportunity to be heard is judicial oppression. *Londoner* v. *Denver*, 210 U. S. 373 (1908), *Morgan* v. *United States*, 304 U. S. 1 (1938), *Erie R. Co.* v. *Paterson*, 79 N. J. L. 512, 76 Atl. 1065 (1910), also cited in the *Wilson* case, attest that the due process guarantee of hearing includes an opportunity for argument. Also pertinent are *State* v. *Milhollan*, 50 N.D. 184, 195 N. W. 292 (1923), and *State* v. *City of Milwaukee*, 157 Wis. 505, 147 N. W. 50 (1914). In the first of these cases the state of North Dakota on relation of an electric utility company and one of its stockholders sued to enjoin the Board of Railroad Commissioners of North Dakota from proceeding in a rate hearing under the state public utility act. On demurrer to the complaint the point made in behalf of the utility company and its stockholder was that the act permitted the Board to make its own rules and regulations as to procedure, that it could therefore set up such rules as to deny a hearing, and that the act was therefore invalid for denial of due process of law as guaranteed by both the state and Federal constitutions. The court held that the act did not permit the Board to set up such rules of procedure as to deny a hearing. It said: "The word 'hearing' contemplates an opportunity to be heard. That is,

not merely the privilege to be present when the matter is being considered, but the right to present one's contention, and to support the same by proof and argument." (50 N. D. at 196, 195 N. W. at 295) In *State* v. *City of Milwaukee* the action was on certiorari by the state of Wisconsin on relation of one Arnold, a city assessor, against the city of Milwaukee and others to review certain proceedings of the common council. The relator had been removed from his office as city assessor by proceedings before the common council under charges of having violated the civil service law. Although oral argument had been allowed before a committee of the council, the relator's counsel had by the common council been denied the right to be heard before it, and it was the body vested with the power of removal. The Supreme Court of Wisconsin held that this denial of a right to be heard before the common council vitiated the removal proceeding. In so holding it said:

> The repeated refusal of the common council to grant either the written or oral request of the relator to hear his counsel before acting upon the report of the committee stands upon a different basis. There are at least three substantial elements of common-law hearing: (1) The right to seasonably know the charges or claims preferred; (2) the right to meet such
> 55 charges or claims by competent evidence; and (3) the right to be heard by counsel upon the probative force of the evidence adduced by both sides, *and upon the law applicable thereto.* If either of these rights are denied a party, he does not have the substantials of a common-law hearing. *Ekern* v. *McGovern*, 154 Wis. 157, 277, 142 N.W. 595, 46 L. R. A. (N.S.) 796 et seq.; and cases cited. That *the word "hearing" includes "oral argument"* is expressly ruled by the following cases: Miller v. Tobin (C. C.) 18 Fed. 609, 616; Joseph D. G. Co. v. Hecht, 120 Fed. 760, 753, 57 C. C. A. 64; Merritt v. Portchester, 8 Hun (N. Y.) 40, 45; Babcock v. Wolf, 70 Iowa, 676, 679, 28 N. W. 490. See, also, Akerly v. Vilas, 24 Wis. 165, 171, 1 Am. Rep. 166. Indeed, the idea of the right of a person to be heard by himself or counsel when his property or his personal rights are questioned was so early and firmly imbedded into the groundwork of our jurisprudence that it is difficult to find instances where it has been challenged even in quasi judicial proceedings. The importance and value of such right is considerable in nearly every case. It is the office of counsel to marshal the facts proven to point out their relative importance, and *to interpret them in the light of the law applicable thereto.* When this is properly done, the judicial mind is enlightened, and is in condition to decide the questions presented with full knowledge of the facts and the law involved. Its importance in the present proceeding is apparent, when it is borne in mind

that the evidence taken by the committee was very voluminous, was read to the common council at a number of different sessions separated by considerable intervals of time, and was wholly circumstantial in character. The right of the relator either personally or by counsel to argue the evidence and the law to the common council, which body alone had the right to remove, is unquestioned. That the denial of such a right was prejudicial follows from what has been said. Nothing herein contained must be construed to question the right of the body before whom a hearing is had to reasonably limit and control the length of time for oral argument. Limitation exercised in that respect would be judicially interfered with only in case of an obvious abuse of discretion.

The trial court seemed to be of the opinion that, inasmuch as the common council could, by ordinance, prescribe the manner of hearing, it could therefore refuse *to hear oral argument.* In the first place the ordinance is silent upon the question of oral argument before the common council, so it had not by ordinance prescribed a hearing without oral argument. In the second place, *authority to prescribe the manner of a hearing does not include the power to suppress or destroy a substantial constituent element of the hearing itself.* [Italics supplied] [157 Wis. at 511-2, 147 N. W. at 52-3].

56 In *Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266 (1933), cited in the *Wilson* case, it is held that the quasi-judicial proceedings of an administrative tribunal must satisfy the pertinent demands of due process. We ruled in the *Wilson* case that private as well as public interests are recognized by the Communications Act. As we said there:

> . . . While a station license does not under the Act confer an unlimited or indefeasible property right (*Commission* v. *Sanders Radio Station*, 309 U. S. 470 (1940))—the right is limited in time and quality by the terms of the license and is subject to suspension, modification or revocation in the public interest—nevertheless the right under a license for a definite term to conduct a broadcasting business requiring—as it does—substantial investment is more than a mere privilege or gratuity. A broadcasting license is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury. . . .

We ruled also in the *Wilson* case that the impairment of such a license right by the granting of conflicting facilities to another station is therefore *pro tanto* a deprivation of property and that the due process clause of the Fifth Amendment, providing that no per-

son shall be deprived of life, liberty or property without due process of law, is pertinent. The authorities cited above confirm the proposition that due process includes opportunity to be heard before the reaching of a judgment, including opportunity to make argument; they confirm also that the due process guarantee of hearing, including opportunity for argument, recognizes no distinction between hearing on questions of law and those on questions of fact.

The due process guarantee of hearing in our system of law has always been recognized as a right in persons, not a privilege to be extended to persons according to the *ex parte* judgment of tribunals as to whether or not there should be a hearing. It is a personal right of access to the courts or to administrative tribunals, a right at the minimum to present one's claim of injury or threatened injury and to be heard to argue in support of the proposition that the allegations thereof, assuming their truth, are legally cognizable, i.e., state a "cause of action." This right of hearing accorded by the due process clause is one of the few rights guaranteed by our Constitution which are substantially absolute. The right is subject to no limitation except such requirements as the payment of a filing fee upon presentation of the claim, or of a jury fee in a case involving a jury trial, and such restrictions as are related to the reasonable convenience of the tribunal as to time, place and length of hearing. This right of hearing stems in Magna Charta in the words:

> . . . no freeman shall be arrested, or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested, and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and *by the law of the land.* [Italics supplied.]

57 The right stems also in recognition of the fact that soundness of decision is promoted by hearings, that tribunals are fallible and need, in order to administer justice according to law, the aid of argument on questions of law and on the meaning of the evidence if the trial of fact issues is reached.

It is of course true that under a system of law that guarantees right of access to judicial and quasi-judicial tribunals as above explained, there will be some abuse of the right. Some claims will be presented which may upon their face appear to be, and which may indeed upon hearing be demonstrated to be, invalid; i.e., to state no "cause of action." But the inconvenience to the tribunal of considering such a claim, i.e., of allowing its presentation and hearing argument in which the complainant has opportunity to try to convince the tribunal that the claim is on its face meritorious, is the unavoidable price of the due process guarantee of hearing. As said by Mr. Justice Brandeis in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-2 (1938): ". . . Lawsuits . . . often prove to

have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." Paraphrasing this for pertinence to the instant situation, complaints or petitions filed in judicial or quasi-judicial tribunals are often found not to contain allegations legally sufficient for relief. But no way has been discovered of relieving a tribunal and a demurring defendant from the necessity of a hearing in which the complainant shall be given opportunity to try to convince the tribunal by argument that the complaint or petition as drawn is not groundless in law. Under our system of law one is not to be turned out of court on an *ex parte* decision that a claim is not legally cognizable and that one cannot even be heard to argue that it is.

That the due process guarantee of hearing on questions of law and fact means a right in persons, not a mere privilege to be extended to them by tribunals according to their *ex parte* judgment as to whether a hearing should be had, is illustrated in *In re Galvin's Estate*, 153 Misc. 11,274 N. Y. S. 846 (1934), which dealt with the right of both notice and hearing. There an accounting executor was permitted by a surrogate to dispense with service of citation upon a known creditor upon the theory that the latter could gain nothing by appearing and attacking a decree of distribution. This was permitted under a statute providing that under named circumstances service of citation might be dispensed with, or, as the court said, authorizing the entry of an inconclusive decree without the obtaining of jurisdiction in the regular ways. Discountenancing this statute under both the state and Federal constitutions the court used these words:

> Each of the Constitutions guarantees to the citizen and only to him—not to any court—the privilege of saying whether or not he will be aggrieved by the proposed action of any court. This makes indispensable some preliminary notice, either actual or its presumptive equivalent, before the court acts; but the privilege not having been extended to the court, it cannot presume, or assume beforehand, without notice, what the citizen might or might not do were he notified. From this viewpoint of constitutional law, it is immaterial that in the judgment of the court he could not possibly be aggrieved by its proposed decree. The right is *his and his alone* to be judge of that before any court passes on it. It is a condition precedent to any court acting that the citizen shall have first had preliminary notice in one or other of the traditional forms, and *an opportunity to be heard.* [Italics supplied] [153 Misc. at 13, 274 N. Y. S. at 849.]

58

In short, the hearing guarantee of the due process clause of the Fifth Amendment accords to every person who claims injury or

threat of injury an unconditional right[3] of access to judicial or quasi-judicial tribunals (according to their appropriate jurisdiction) to the extent at least of being allowed to present his claim and to argue that the allegations thereof if true entitle him as a matter of law to relief—to contend that his claim, assuming the truth of the allegations thereof, states a "cause of action" cognizable under the rules, principles, concepts or standards of law which the tribunal is empowered to apply; and a right, if after argument it is decided that the allegations of the claim do state a "cause of action," to present proof as to the truth of the allegations, i.e., a right to a trial. The contention of the Commission in the instant case and the view of the minority in this court make this right conditional. Under the view of the minority, opportunity to be heard in argument on the question of the legal sufficiency of the allegations of a claim of injury or threatened injury (in the instant case the claim of threatened injury to WJR by the proposed operation of Coastal Plains) will not be granted except upon the condition that the tribunal to which the claim is presented thinks *ex parte* that there is a substantial question as to whether the allegations thereof are legally sufficient. If to the tribunal, acting *ex parte*, it appears clear upon the face of the claim that it is not sufficient, no argument will be allowed. The claimant will not be permitted to try to convince the tribunal that a "cause of action" is stated. The criterion for determining whether an argument will be allowed is what the tribunal without hearing argument thinks as to the sufficiency of the claim. Right of access to courts and commissions is reduced to the right to file one's claim—to drop it, so to speak, into the governmental slot. This manner of dealing with the claims of persons who assert injury or threatened injury is in the view of the majority of this court foreign to our system of law.

The majority view may be epitomized as follows: There are in all cases in which the action of a governmental tribunal is invoked by the filing of a complaint of petition two possible questions. One, raised by demurrer or motion to dismiss or, in an administrative proceeding, by some less formally named instrument of like purpose, or by the tribunal's *sua sponte* treatment of a petition as if under demurrer, is whether or not the allegations of the party invoking the tribunal's action—assuming the truth of such allegations—state facts which the law recognizes as actionable within the
59 ambit of the remedial powers assigned by the sovereign to the tribunal. This question, one of law, is to be determined by the consideration of legal materials, such as statutes and rules and judicial decisions, to be brought to the attention of the tribunal in the arguments of the parties. If this question of law is raised, and answered in the negative, then the party seeking the tribunal's

[3] Subject only to such limitation as is above referred to.

action, unless he is allowed to amend and can amend his allegations, is disabled on the merits to proceed further. If, on the other hand, this first question is raised and answered in the affirmative, i.e., by a holding that the allegations, assuming their truth, do state facts which the law recognizes as actionable within the ambit of the tribunal's powers, then the second question arises, usually by so-called traverse or answer or, in an administrative proceeding, by an opposing instrument of less formal name. That question is whether or not the facts alleged by the party invoking the tribunal's action are true. That is a question of fact which is to be determined by a consideration of the evidence to be produced by the parties, by cross-examination of witnesses and by argument as to the meaning and legal effect of the evidence. Guarantee of hearing, whether in the due process clause or in a statute, assures a hearing not alone on such a question of fact but also upon the threshold question of law. Unless this is true the guarantee of hearing, unless the judgment of governmental tribunals on questions of law is infallible, is worthless. For if the tribunal errs in its *ex parte* decision on the threshold question of law, then the party invoking the tribunal's aid is disabled to proceed further. He will therefore never reach a hearing on the second question—will never have the opportunity to present evidence in support of his claim of injury. It is of course true that the presentation of legal materials and argument may not persuade the tribunal to a correct decision, but it is the theory of our jurisprudence—and one justified by experience—that a tribunal is less likely to err if it hears the parties and their counsel. It is further the theory of our jurisprudence that for reasons both of fair play and of respect for government, a party claiming injury or threatened injury shall be heard in support of the legal sufficiency of his allegations before decision is made on the question of their sufficiency, and this notwithstanding that it may appear to the tribunal *ex parte* that they are legally insufficient. In no other manner can right of hearing be protected. If the line is drawn elsewhere, as by according, as the minority in this court suggests, power in the tribunal to deny hearing if it is *ex parte* of the view that the allegations of the complaint or petition are legally insufficient, then it is within the power of the tribunal to deny all parties claiming injury or threatened injury access to a governmental tribunal except to the extent of filing a claim.

The authorities relied upon by the minority do not, in the view of the majority of this court, support departure from the established precept of the due process clause and the long established practice thereunder. It would unduly prolong this opinion to discuss each of the cases cited. It will be sufficient here to state and comment upon three of them: In *Beaumont, S. L. & W. Ry. v. United States*, 282 U. S. 74 (1930)—the appellant railroads filed an action before a three-judge Federal district court to set aside an order of the

Interstate Commerce Commission prescribing a division of
60 joint rates between connecting railroads. The Commission and other railroads intervened. The appellants claimed that the division of rates between connecting carriers was such that it amounted to confiscation, i.e., that the share going to the appellants was too small. They asserted in particular that the rates division prescribed was based on average conditions rather than on the effect on each individual railroad. The three-judge court found that the Commission had had before it evidence sufficient to disclose the effect on each railroad of the rates division and it held that the Commission could properly use averages to determine division and that there was nothing in the record to show that the Commission had not considered the effect on each carrier of the rates based on averages. The appellants urged that the division of rates prescribed by the Commission's order would deprive them of their property without due process of law. The Court held that there was nothing in the complaint or in the evidence that showed that the division of rates would not give the appellants enough to cover operating expenses plus a reasonable return and that to invoke the constitutional protection of the due process clause appellants must show that they would be denied just compensation. The Court said:

> 'Appellants claim that the Commission's order, if enforced, will operate to deprive them of their property without due process of law in violation of the Fifth Amendment to the Constitution. It is well-established by the decisions of this court that, in order to invoke such constitutional protection, the facts relied upon to prevent enforcement of rates prescribed by governmental authority must be specifically alleged and from them it must clearly appear that the enforcement of the measure complained of will necessarily deny to the utility the just compensation safeguard to it by the Constitution . . . [282 U. S. at 88].'

61 But this case does not rule that the question whether or not such facts are alleged can be determined without a hearing. No such question was involved in the case. It does not appear that a hearing had been denied by the three-judge court on the question whether or not the complaint filed by the appellants alleged facts necessary to raise a constitutional question. The decision of the Supreme Court is therefore neither an express nor an implied ruling that such a hearing can be validly denied. All that the case holds is that a complaint invoking constitutional protection must in order to constitute a foundation for relief allege facts from which it appears that the enforcement of a measure complained of will invade a constitutional right. This proposition the majority in the instant case do not dispute. Every complaint invoking the action

of a tribunal whether under the Constitution, statutes or common law, must allege facts which constitute a "cause of action" recognized by law, otherwise the complaint will be held insufficient if demurred to. But it does not follow from this that dismissal can validly be made without according to the complainant a hearing, i.e., an opportunity to try to convince the tribunal by argument that the facts alleged do state a "cause of action." The *Beaumont* case does not so hold.

*Bourjois, Inc.* v. *Chapman*, 301 U. S. 183 (1937), involved an appeal from a decree of a three-judge Federal Court dismissing after trial the plaintiff's bill to enjoin as unconstitutional the enforcement of a statute of Maine requiring registration and the issuance of a certificate of registration by the Department of Health and Welfare to manufacturers, proprietors or producers of cosmetics. It appeared that the plaintiff manufactured cosmetics in New York, had no place of business in Maine, did not hold, use, apply, or sell cosmetics within the state of Maine, and that it had not applied for a certificate. Among the plaintiff's customers were some whose places of business were in Maine. Their purchases were made in part on orders given in Maine to traveling salesmen of the plaintiff, but no order so given was binding until approved by the plaintiff in New York. All shipments to Maine customers were made from New York and the sales in Maine were not made in the original packages. The plaintiff announced in the case that it would refuse to apply for a certificate because the registration statute was void under the Federal and state constitutions. The statute was attacked as a violation of the commerce clause and on other grounds including an objection that the power conferred upon the board to grant or deny a certificate was unlimited and that the board had issued no regulations and that neither the statute nor the board had provided for hearing an applicant. The Supreme Court stated that, the plaintiff not having applied for a certificate, it was not to be assumed that if it concluded to do so its application would be refused or that the board would deny any right to which it was entitled. The plaintiff urged further that relief should be granted because the provisions of the statute concerning seizure and forfeiture of unregistered cosmetics violated the constitution of Maine. As to that the Court said:

62 . . . To that claim it is a sufficient answer that if there is a wrongful seizure, it will be of goods belonging to others. For, as the bill and findings reveal, no goods of the plaintiff will ever be liable to seizure, since the plaintiff will have none in Maine. If under this statute the constitutional rights of others are violated by an unlawful seizure and forfeiture, they, and not the plaintiff, must seek the redress. . . . (301 U. S. at 190).

The case holds merely that unless a plaintiff alleges (and by the event of trial shows) that he is affected by the operation of a statute, he cannot attack its constitutionality. The Court does not rule that a plaintiff need not be given an opportunity to argue that he has alleged facts from which it appears that he will be affected by the statute. No question of the right to make such an argument was involved in the case.

In *California Water Service Co.* v. *Redding*, 304 U. S. 252 (1938), an action was brought by the appellants California Water Service Company and another to enjoin the city of Redding from receiving a grant allotted by the Federal Administrator of Public Works under Title 2 of the National Industrial Recovery Act and supplemental legislation to aid the city in the construction of a municipal water works system, and also to enjoin the city from expending the proceeds of the sale of city bonds (issued under state statutes) for the purpose of constructing such a plant. The bill of complaint filed in a three-judge Federal court alleged that the grant of Federal funds and the legislation said to authorize it were invalid under the Federal Constitution, Articles I (Sections 1, 8 and 9) and II (Sections 1 and 3) and the Tenth Amendment, and also that the grant was in violation of the Federal statutes referred to. The three-judge court decided that the bill of complaint stated no cause of action within its cognizance and dismissed the same. On appeal this was affirmed upon the ground that there was no substantial claim of unconstitutionality of a state statute or administrative order as required in Section 266 of the Judicial Code. More fully, it was held that Section 266, providing for the convening of a three-judge Federal court in an action to restrain the enforcement of a state statute on the ground of the unconstitutionality thereof under the Federal Constitution, does not apply unless a substantial question is presented, and that therefore it is the duty of a district judge to whom an application for an injunction restraining the enforcement of a state statute or order is made to scrutinize the bill of complaint to ascertain whether a substantial Federal question is presented since otherwise the provision for the convening of a court of three judges is not applicable. But the case does not hold that a plaintiff presenting such a bill of complaint can lawfully be denied the right to argue to the judge that his bill does state facts which present a substantial Federal question. The Court said also that when it becomes apparent that a plaintiff has no case for three judges, although they may be properly convened, their action is no longer prescribed. But again the case does not rule that a plaintiff cannot be heard to argue that a court has been properly convened. No such questions as to the right of argument were before the Court.

63 There are listed in the margin other cases relied upon by the minority.[4] Analysis thereof shows that no more than those above discussed do they support the position of the minority or the position taken by the Commission in the instant case.

It is urged by the minority that the due process clause reads "No person shall . . . be deprived of . . . property, without due process of law" and that one who is not injured, i.e., one who does not allege injury or threatened injury (in terms of the instant case does not allege objectionable interference within the protected contour of the outstanding station), will not be deprived of property and is hence not entitled to a hearing. The fallacy in this argument lies in an ambiguous use of the word "hearing." The word "hearing" thus used can have two meanings. One denotes a hearing on the truth of allegations made by a complainant. In that sense of the word the generalization is correct; there is no division in the court on this. No person is entitled to a trial on the issue of the truth of the facts he alleges unless such facts legally constitute a "cause of action." But the word "hearing" properly denotes also a hearing on the question of law as to the sufficiency of the allegations made by a complainant. In this sense of the word the generalization invalidly asserts that such a question can be decided without a hearing, i.e., without allowing the complainant an opportunity to argue to the tribunal to which his complaint is presented that the allegations of the complaint, assuming their truth, are as a matter of law sufficient. The assertion is invalid because the due process clause guarantee of hearing extends, as demonstrated above, to questions of law as well as to those of fact, and because the guarantee of hearing, as also demonstrated above, is not conditional upon the *ex parte* view of the tribunal as to whether there is a substantial question as to the sufficiency of the allegations of a complainant.

WJR as an outstanding licensee is not a mere permissive intervener or, as the minority puts it, an "outsider." Under Section 312(b) of the Communications Act and the ruling of the Supreme Court in the *KOA* case, if the license of WJR as an outstanding station will suffer indirect modification by the operation of the

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[4] *Denver Stock Yard Co.* v. *United States*, 304 U. S. 470 (1938); *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249 (1931); *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440 (1928); *Lampasas* v. *Bell*, 180 U. S. 276 (1901); *Western Union Tel. Co.* v. *Ann Arbor R'd Co.*, 178 U. S. 239 (1900); *Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 199 (1878); *Clark* v. *Kansas City*, 176 U. S. 114 (1900); *Tennessee Power Co.* v. *T.V.A.*, 306 U. S. 118 (1939); *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1 (1923); *Electric Bond Co.* v. *Commission*, 303 U. S. 419 (1938); *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923); *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171 (1939).

applicant station, Coastal Plains, WJR is entitled to a hearing on the question whether or not such modification is required by the public interest; and under the ruling of this court in the *Wilson* case it is entitled first to a hearing on the issue modification
64 *vel non* itself and therefore, as above explained, at the threshold to a hearing on the question raised, as if on demurrer, whether or not the allegations of its petition for reconsideration show that there will be an indirect modification of its license by the operation of Coastal Plains.

It is not, as asserted in the minority opinion, the contention of the majority that the Constitution requires oral argument in order that a pleader may have a chance to persuade the tribunal that he has an interest "despite" his allegations. On the contrary, the position of the majority is, as above stated, that every person who claims injury or threat of injury has a right to contend before an appropriate tribunal that "within" the allegations of his claim, assuming their truth, he states a "cause of action" cognizable under the rules, principles, concepts or standards of law which the tribunal is empowered to apply.

We conclude that under the due process clause of the Fifth Amendment WJR is entitled to a hearing before the Commission as to the sufficiency of the allegations of its petition for reconsideration, assuming their truth, to show indirect modification of its license by the granting of the Coastal Plains application.

III

It is, however, contended by the Commission that even if it erred in denying to WJR an opportunity to be heard on the question whether or not the allegations of its petition for reconsideration, assuming their truth, "showed" objectionable interference to WJR within its lawfully protected contour by the operation of Coastal Plains, and consequent indirect modification of WJR's license, nevertheless the decision reached by the Commission as to the sufficiency of the allegations of WJR's petition was correct and that this court can so determine. This contention of the Commission is not supportable—this court cannot now so determine. The contention that it can omits to recognize the distinction between questions of correct procedural action and questions of correct decision on the merits.

Whether the Commission was under a duty to accord a hearing, i.e., to hear argument before deciding whether the allegations of WJR's petition were sufficient is a procedural question quite separate from the question on the merits whether or not the allegations of the petition, assuming their truth, were sufficient. If it was the duty of the Commission to accord the hearing, to hear argument, on the question of the sufficiency of the allegations of the petition

before deciding as to their sufficiency, then the question of the correctness of its decision as to their sufficiency is not properly before this court. The Commission's decision has not been validly reached and until it has been validly reached it is not properly reviewable. As this court ruled in the *Wilson* case, the statutory scheme set up in the Communications Act contemplates, before review in this court, proper exercise of the Commission's primary jurisdiction, i.e., valid first instance hearings properly conducted from the procedural—due process—standpoint. The court,
65 in the view of the majority, must therefore remand the case with directions to the Commission to allow a hearing to WJR. Then if after hearing the Commission decides that the allegations were insufficient and dismisses the petition (i.e., allows the grant of the Coastal Plains application to stand) an appeal to this court will bring properly before us the question of the correctness of the Commission's decision on the merits as to the sufficiency of the allegations to show indirect modification of the license of WJR as an outstanding station by the operation of Coastal Plains.

For the court to hold that the Commission was under a procedural duty to hear argument on the merits before deciding on the merits, but nevertheless to review the Commission's decision on the merits and either affirm or reverse it, would be for the court to condone the denial of hearing, the refusal to hear argument. Denial of a procedural right guaranteed by the Constitution—in this instance denial of a hearing guaranteed by the due process clause—is never "harmless error."

An example of this may be supplied from criminal proceedings. Suppose that a verdict of guilt of murder and a sentence imposed under such verdict were appealed on a record which included the evidence, exhibits, arguments to the jury, and instructions, that is to say, all items conventionally necessary for review on the merits. But suppose that the contention of the appellant is that he was excluded from the courtroom during the trial, and that this was a denial of a procedural right guaranteed by the Constitution. Suppose that the Government conceded that the appellant was excluded from the courtroom during the trial but contended first that the Constitution did not require his presence (just as the Commission contends here that the Constitution does not guarantee a hearing) and second that, in any event, the verdict of guilt was correct under the evidence and the instructions. If the court decided that the exclusion of the appellant from the courtroom was a procedural error, a violation of a constitutional guarantee (this of course the court would be obliged to decide), the court would decline to consider the question of the correctness of the verdict under the evidence and the charge and would remand the case for a new trial

with directions that the appellant should be allowed to remain in the courtroom during the trial. No matter how clear it might appear under the evidence that the appellant was "guilty" the court would be obliged to hold the verdict and sentence vitiated by the exclusion of the appellant from the courtroom. The court would recognize that there can be no validly "correct" verdict, no valid "guilt," until there has been a trial conducted in accordance with fundamental procedural guarantees. By parity of reasoning: In the instant case, since the due process clause does guarantee to WJR a right to make argument to the Commission in support of the sufficiency of the allegations of its petition for reconsideration before the Commission decides the question of their sufficiency, then since the Commission denied that right of argument this court must decline to consider the question of the "correctness" of its decision as to the sufficiency of the allegations until the Commission on remand has accorded WJR the right to make argument, and thereafter has reached a decision as to the sufficiency of the allegations. Only then will there be a valid first instance
66 decision by the Commission which can properly be reviewed on the merits in this court. The court must recognize that there can be no valid "insufficiency of allegations" until there has been a decision as to their sufficiency reached in a manner consistent with fundamental procedural guarantees. There can be no "correct" decision on the merits which the court can review until a decision has been properly reached in view of the procedural guarantee of hearing.

The foregoing is epitomized in the *Wilson* case in the concluding aphorism: "He who decides anything, one party being unheard, though he should decide right, does wrong."

The Commission contends further that even if it did commit procedural error in denying hearing the case need not be remanded for hearing; that a hearing can be afforded in this court on the sufficiency of the allegations of WJR's petition. This contention is not supportable. It again ignores that the statutory scheme contemplates a procedurally valid first instance hearing in the administrative tribunal before review. As this court said in the *Wilson* case:

> The contention of the Commission that it could properly decide the issue before it without a hearing, leaving any hearing to an appeal, ignores the respective positions and functions of the Commission and this court in the statutory scheme for administration of the Act. It is true that this court has power under Section 402(c) to rule on questions of law. But . . . its rulings are in review, not in the first instance. The Commission is first, in the exercise of its primary jurisdiction, to apply its expertise and make a "full statement in writing of the facts and grounds for its decision as found and given by it

. . . . " (Section 402(e)). Administrative tribunals must, in the nature of their functioning, make decisions on questions of law in the first instance. They cannot reach decisions without applying to the facts they find the law governing their action; and to apply the law they must first determine what it is. Cf. *United States* v. *Louisville & N. R. R.*, 235 U. S. 314, 320-21 (1914); *Rochester Telephone Corporation* v. *United States*, 307 U. S. 125, 136 (1939); 1 Vom Baur, *Federal Administrative Law* § 73 (1942). Nothing in the Communications Act or in any judicial construction thereof of which we are aware indicates that it was the intention of Congress that the Commission should exercise its primary jurisdiction on questions of fact only, and not on mixed questions of fact and law or questions of law alone. We think the Act, rightly viewed, contemplates hearings by the Commission in the first instance on all such questions.

67 IV

It is contended by the Commission that WJR did not in the instant case in its petition for reconsideration request a hearing on the question whether or not its petition alleged facts which if true "show" that it will suffer objectionable interference within its protected contour by the operation of the Coastal Plains station and that this forecloses WJR's right to such a hearing. It is true that the prayer does not specifically request such a hearing. The prayer is: "Wherefore, the petitioner requests the Commission to reconsider its action of August 22, 1946, and to designate the Tarboro Broadcasting Company [Coastal Plains] application for hearing or, in the alternative, to hold in abeyance its grant of such application until after a decision in the *Clear Channel* case." But if WJR's request for hearing is too broad, i.e., if, as the Commission appears to contend, WJR is asking for an immediate hearing on the question whether public interest requires operation of the Coastal Plains station at the cost of indirect modification of WJR's license before determination of the question whether or not the allegations of WJR's petition, assuming their truth, "show" indirect modification of WJR's license, the Commission is at liberty, as this court ruled in the *Wilson* case, to hold a hearing first on the issue modification *vel non*, and at the threshold of consideration of that issue to treat WJR's petition as if on demurrer. In view of the broad powers of the Commission for orderly procedure, including its power to deal with WJR's petition for reconsideration first as if on demurrer, it ought not decline to do so upon the ground that the prayer of the petition was phrased too broadly: it ought not on such ground deny WJR a hearing on the very question which it, the Commission, actually ruled on and decided in the negative *ex parte*, to wit, the question whether or not the

allegations of the petition, assuming their truth, showed that WJR's license would be indirectly modified by the operation of the Coastal Plains station. It would be technical indeed for the Commission to refuse a hearing on that question merely upon the ground that the prayer of the petition improperly requested a broader hearing. It is not contemplated by the Communications Act—especially in view of the liberal procedure permitted thereunder—that the Commission shall deal so strictly with litigants before it. Not even a court would be justified in taking so technical a position as this.

The decision of the Commission of August 22, 1946, granting without hearing the application of the Coastal Plains Broadcasting Company, Inc., for a construction permit to erect a new standard broadcast station and the decision and order of the Commission of December 17, 1946, denying without hearing the appellant's petition for reconsideration of the Commission's decision of August 22, 1946, are reversed and the case is remanded for further proceedings in accordance with this opinion.

*Reversed and remanded.*

68 PRETTYMAN, J., with whom EDGERTON, J., concurs, *dissenting:*

The opinion of the court states our difference of view. The ruling is that a petitioner for intervention in an administrative proceeding is entitled to an oral hearing as a matter of constitutional right, no matter what or how little he says in his petition. It is my view that a petition for intervention can be denied without a hearing, if the petitioner does not allege any fact which indicates a threatened damage to, or modification of, some existing right of his, or a fact which at least presents a substantial question in that regard.

Perhaps some preliminary observations will serve to clarify the issue. The opinion of the court describes WJR's petition to the Commission as one for reconsideration of the decision in the *Coastal Plains* case. That is true; it was. But it was basically a petition to intervene as it asked that WJR be made a party to the Coastal Plains proceeding.[5] And that intervention was a necessary prerequisite to those portions of the petition which prayed for the hearing on the Coastal Plains application. What we are really considering is the petition to intervene. The question is: Does the Constitution require that WJR have an oral hearing upon its

[5] Technically, under the Rules and Regulations of the Federal Communications Commission, Part 1, relating to organization and practice and procedure, this appellant's petition was for rehearing under § 1.390, rather than to intervene under § 1.388. But in effect it was a petition to intervene. The status of such a station was held to be that of an intervenor in *Federal Communications Comm'n* v. *National Broadcasting Co.*, 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035 (1943).

prayer to be made a party to the Coastal Plains case? In its present opinion, the court declines to consider that portion of the petition which prays for reconsideration of the Commission's decision granting the Coastal Plains application.

The opinion discusses the right of access to the Commission. As I see it, that is not involved. WJR had such access. It filed its petition—in such form as it wished and with a supporting affidavit—and the petition was considered and disposed of by a long opinion. The point in controversy here is whether that right of access necessarily includes an oral hearing.

The court says that a petitioner is entitled to hearing upon questions of law. I do not dispute that proposition. But I say that a question of law must be presented before there need be a hearing upon it, and that questions of law are presented only upon allegations of fact. Such questions do not exist *in vacuo* in judicial or quasi-judicial proceedings. The mere assertion of an abstract proposition of law does not constitute a justiciable issue. The key to the present controversy is whether facts must be alleged in sufficient quality and quantity to present a question of law.

69 The court says that if no oral hearing be had upon a petition to intervene, the petitioner is "disabled to proceed further" and thus is left to the premise of infallibility on the part of the Commission. I do not agree with that view. Such a petitioner has an appeal just as if he had had a hearing, and if his allegations of fact are sufficient, in the view of the appellate court, to present a question as to his rights, the court will so hold. If the reply to this view be that the Constitution does not guarantee an appeal, then I say that the Constitution leaves petitioners to the peril of fallibility of the Commission, hearing or no hearing. Moreover, the Commission is an executive agency, and its actions must under the Constitution be subject to judicial scrutiny for constitutional validity.

One more preliminary observation should be made. We are not discussing the desirability of a hearing. We are concerned only with whether a hearing was required. Courts are without power to require a hearing in an administrative proceeding unless a hearing is required by the constitution, a statute, a valid administrative regulation, or a binding contractual agreement. No matter how desirable a hearing may be in the premises, or how greatly a hearing might facilitate sound disposition of a controversy, the courts cannot compel it, unless there be some requirement for it other than the court's own view. The courts cannot require an administrative agency to do that which is merely patently desirable. They can require only that the agency comply with the Constitution, the statutes, and its legal obligations.

Because the question principally at issue is of such vast practical importance in both administrative and judicial proceedings, I state my view upon it at somewhat greater length than might otherwise be justified.

Appellant's station, WJR, is a Class I-A "clear channel" station. Its rights are only those contained in its license. The statute itself is explicit in providing that no license "shall be construed to create any right, beyond the terms, conditions, and periods of the license." The Supreme Court has given effect to rights of an existing licensee in respect to changes, whether nominal or actual, in the terms of it license[6] but the Court has not suggested that the rights of a licensee are greater than the terms of his license.

70 The status and rights of a Class I-A clear channel station are described and defined in the Commission's Rules and Regulations and in its "Standards of Good Engineering Practice"[7]. Its nighttime rights and its daytime rights are wholly different. At nighttime a Class I-A clear channel station is given absolute protection; that is, no other station is permitted to broadcast on its frequency at night. But the Rules are just as clear that in the daytime other stations can be assigned to that frequency.[8] The rights of a Class I-A station in daytime are defined with precision: ". . . during daytime the Class I station is protected to the 100 uv/m ground wave contour.[9]" The area thus defined is called the normally protected contour or area.

This concept of normal protection in the daytime is clear. The circumferenee of the protected area is a contour line, which is fixed by measurement of the strength of the radio waves from the particular station. That strength, or intensity, is measured in terms of microvolts (millionths of a volt) or millivolts (thousandths of a volt) per meter, abbreviated as uv/m and mv/m, respectively. The wave which is measured is the groundwave, which follows the surface of the earth and extends greater or less distances depending upon the nature of the earth, its topography, and such obstacles as noise and steel structures. Generally speaking, the greater the distance from the station, the less the strength of the station signal.

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[6] *Federal Communications Comm'n* v. *National Broadcasting Co.*, *supra* note 1.

[7] Standards of Good Engineering Practice concerning Standard Broadcast Stations, revised to June 1, 1944 (hereinafter referred to as "Standards"). These contain detailed statements relative to broadcasting standards and are auxiliary to the Commission's Rules. Some portions of the Rules expressly refer to the Standards and, seemingly, they are accorded the force and effect of the main body of the Rules, to that extent at least. The parties before us are in agreement in so treating them.

[8] Standards, pp. 1-2.

[9] *Ibid.*

The "100 uv/m ground wave contour" named in the Commission's Standards is the imaginary line which connects all points at which the ground wave of the station is of 100 microvolts per meter strength. The area within that irregular circumference is the normally protected area.

The Standards also prescribe conditions under which a station may have protection outside and beyond the area which is normally protected. They provide that when it is shown that "primary service" is rendered by a station beyond the normally protected contour, and that primary service to approximately 90 per cent of the population in that area is not supplied by another station, "the contour to which protection may be afforded in such cases will be determined from the individual merits of the case under consideration." [10] Thus every station has normal protection, and those which comply with the prescribed requirements may secure such additional protection as the individual merits of their cases justify.

Obviously, this additional protection would be upon specific
71 application, showing, finding and award.

WJR had normal protection and no more. Its license contained no special provision as to protection. It does not allege that it ever applied to the Commission for additional protection based upon the individual merits of its case, as provided in the permissive sections of the Standards. The daytime protection afforded by its license was to its 100 uv/m groundwave contour, and no further.

In its petition to the Commission, WJR said that its present interference-free service area would be subjected to objectionable interference by the Coastal Plains station, and referred to an attached engineer's affidavit for details. The engineer recited that he had made calculations of the relative field intensities of the two stations, and assumed that interference would be objectionable when the field intensity of the Coastal Plains station, exceeded 10 per cent of the time, was 5 per cent or more of the average measured field intensity of WJR, which calculations are in accord with the Commission's standards. These calculations showed, the engineer stated, that the service of WJR would be so interfered with between 10 A.M. and 2 P.M. in an area in which the field intensity of that station averages 32 microvolts per meter or less during daytime hours. Thus WJR did not allege to the Commission that the Coastal Plains operation would cause daytime interference with its signals or service within its 100 uv/m groundwave contour. Its engineer's affidavit was quite explicit that the interference from Coastal Plains would occur in areas where WJR's average signal strength was only 32 uv/m, which is well outside the 100 uv/m contour. So the facts alleged in the petition for intervention and

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[10] *Id.*, p. 4.

hearing as presented to the Commission, taken as fully true, do not show any threatened interference in the only area in which WJR is protected.

72. WJR also alleged in its petition to the Commission that "The substantial number of listeners now depending upon WJR service in this area will be deprived of such service through the operation of the proposed Tarboro (Coastal Plains) station." The engineer's affidavit contained no such statement and no factual basis for it. The extreme of the engineer's conclusions was that the Coastal Plains signal would exceed 5 per cent of the WJR signal in the described area for more than 10 per cent of the time. The petition does not allege any facts which indicate a threat to any of WJR's present property or license rights.

As I have said, it is my view that a person has not established his right to a hearing under the Fifth Amendment, under the Communications Act, or under the Commission's Rules and Regulations, until he has alleged some fact which indicates a threatened damage to, or modification of, some existing right of his; or facts which at least present a substantial question in that regard[11]. If a person has a right of protection within a 100 uv/m contour, and he alleges that a contemplated new operation will interfere with him at his 32 uv/m contour, he has not alleged that he would be deprived of property by the new operation, or that his license would be modified by it. He has not alleged, factually, that he is entitled to be heard upon the newcomer's application.

I think that the applicable rule is stated in *Beaumont, S. L. & W. Ry. v. United States*,[12] where the Supreme Court said:

> "Appellants claim that the Commission's order, if enforced, will operate to deprive them of their property without due process of law in violation of the Fifth Amendment to the Constitution.
>
> "It is well-established by the decisions of this court that, in order to invoke such constitutional protection, the facts relied upon to prevent enforcement of rates prescribed by governmental authority must be specifically alleged and from them it must clearly appear that the enforcement of the measure

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[11] Some phases of this problem are discussed in the several opinions in *National Broadcasting Co. v. Federal Communications Comm'n*, 76 U. S. App. D. C. 238, 132 F. 2d 545 (1942), aff'd, 319 U. S. 239, 87 L. Ed. 1374, 63 S. Ct. 1035 (1943). In that case it was undisputed that the new operation by WHDH would cause objectionable interference to KOA's service in violation of its license, since the new operation was to be at night, when KOA, as a Class I station, was fully protected. KOA so alleged in its petition to intervene.

[12] 282 U. S. 74, 88, 75 L. Ed. 221, 51 S. Ct. 1 (1930).

complained of will necessarily deny to the utility the just
73 compensation safeguarded to it by the Constitution."[13]

The due process of law protective provision of the Constitution, like any other man-made law, must be invoked by an allegation of facts. In our jurisprudence a plaintiff must state a factual cause of action. Even the new Federal Rules of Civil Procedure require that the statement of the claim must show that the pleader is entitled to relief.[14] Neither a blank sheet of paper nor a mere naked assertion of a legal proposition depicts a legal right in a certain person in a certain case or presents a justiciable controversy. Not every assertion, by a pleader, of lack of due process poses a constitutional question.[15]

Parenthetically I note that an oral argument upon its prayer for intervention is not the hearing which WJR requests. It did not ask, and does not now ask,[16] that its prayer to be made a party be set down for argument before the Commission. Its request is that the Coastal Plains application be set down for hearing. The court is not proposing to grant that request, or even to act upon it.

We have no difference of opinion upon the proposition that if the facts as alleged clearly show that the person making the allega-

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[13] *See also Denver Stock Yard Co.* v. *United States*, 304 U. S. 470, 484, 485, 82 L. Ed. 1469, 58 S. Ct. 990 (1938); *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249, 254, 255, 75 L. Ed. 1010, 51 S. Ct. 458 (1931); *Aetna Insurance Co.* v. *Hyde*, 275 U. S. 440, 446, 447, 72 L. Ed. 357, 48 S. Ct. 174 (1928); *Lampasas* v. *Bell*, 180 U. S. 276, 283, 45 L. Ed. 527, 530, 21 S. Ct. 368 (1901); *Western Union Telegraph Co.* v. *Ann Arbor R. Co.*, 178 U. S. 239, 243, 244, 44 L. Ed. 1052, 1054, 20 S. Ct. 867 (1900); *Gold Washing and Water Co.* v. *Keyes*, 96 U. S. 199, 203, 24 L. Ed. 656, 658, 659 (1878). *Cf. Clark* v. *Kansas City*, 176 U. S. 114, 118, 44 L. Ed. 392, 397, 20 S. Ct. 284 (1900): "Not a law alone, but a law and its incidence, are necessary to justiceable right or injury; . . ."

[14] Fed. R. Civ. P., 8 (a).

[15] One not affected may not raise a constitutional question. *Tennessee Power Co.* v. *T.V.A.*, 306 U. S. 118, 83 L. Ed. 543, 59 S. Ct. 366 (1939); *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 42, 67 L. Ed. 839, 43 S. Ct. 470 (1923); and many other cases to the point collected in the digests, treatises and restatements. As to speculative inquiries in hypothetical controversies, see *Electric Bond Co.* v. *Securities and Exchange Comm'n*, 303 U. S. 419, 443, 82 L. Ed. 936, 58, S. Ct. 678 (1938); *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183, 188, 81 L. Ed. 1027, 57 S. Ct. 691 (1937); *Massachusetts* v. *Mellon*, 262 U. S. 447, 484, 488, 67 L. Ed. 1078, 43 S. Ct. 597 (1923).

[16] Appellant "prays an order reversing said decisions (the original grant of the Coastal Plains application on August 22, 1946; the grant of a modified Coastal Plains application on October 14, 1946; and the denial of appellant's petition on December 17, 1946) of the Federal Communications Commission and for such further relief as this court may deem just and proper."

tions has an interest in the proceeding (i.e., that a legal right of his is involved), he cannot be denied participation in the proceeding without an opportunity to prove the facts; if he proves his facts, he is entitled to participate in the proceeding from then on. And we agree that if, upon the acts as alleged, a real and substantial question of law arises as to whether he has an interest in the matter, due process of law requires that he be heard on the question of law. A real and substantial threat of injury is sufficient to invoke the protective clause.

74 Of course, the difference between what is and what is not a substantial question of law is often difficult to decide. But our practice has many instances in which it must be decided. Rule 61 of the Federal Rules of Civil Procedure and Rule 52(a) of the Federal Rules of Criminal Procedure, dealing with error not affecting "substantial rights" are two. Rule 46(a) of the Criminal Rules, dealing with bail pending appeal when "a substantial question" is presented, is another. What is "substantial evidence" is still another. Perhaps the necessity for a "substantial" federal constitutional question as a prerequisite to the convening of a three-judge court[17] is the most vivid illustration.

The court relies upon an analogy to a demurrer, and extends its ruling to cover motions to dismiss, which are the new substitutes for demurrers. I doubt that the analogy is complete, this being a petition to intervene in an administrative proceeding; but, apart from that consideration, I do not believe that the Constitution unequivocally and in all events requires a hearing upon a demurrer. It is my view that if a complaint fails to allege facts which even pose a substantial question whether the complainant is entitled to relief, the court can dismiss it without hearing. The Rules of Civil Procedure having abolished demurrers and substituted therefor motions, provide:[18]

> "To expedite its business, the court may make provision by rules or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition."

The ruling of the court in this case would make that rule invalid when applied to motions to dismiss. I do not think it is invalid.

Moreover, the local rules of court in this jurisdiction provide for

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[17] Act of Aug. 24, 1937, 50 Stat. 752, 28 U.S.C.A. § 380a (Supp. 1946). *California Water Service Co.* v. *Redding*, 304 U. S. 252, 82 L. Ed. 1323, 58 S. Ct. 865 (1938); *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171, 83 L. Ed. 1189, 59 S. Ct. 804 (1939).

[18] Fed. R. Civ. P., 78.

an oral argument of ten minutes on motions.[19] If that oral argument were designed to fulfill constitutional requirements, it could not be limited to ten minutes. A rule designed to meet constitutional requirements, and effective to that purpose, would have to be phrased in terms of adequacy of presentation. In my view, the local ten-minute rule on motions is a rule of court convenience and has no basis in constitutional necessities.

The decision of the court that the Constitution requires an oral hearing on all petitions for intervention would cause extensive
75 revision of the rules of administrative agencies. I have examined many of those rules and find no indication of any thought that such petitions must necessarily be set for oral hearing. The fact that they make no such provision is, of course, unimportant if they are constitutionally inaccurate in that respect. But it is an interesting circumstance that the requirement is not generally, if at all, recognized. All those rules will have to be revised under the opinion and decision of the court in the present case.

The foregoing observations in respect to the Fifth Amendment apply also to the contention that the Communications Act requires that WJR be given a hearing. The Act[20] requires a hearing before an existing license can be modified, a licensed facility changed, or an application for modification of a license denied. A license is not being modified unless one of its terms is being changed, encroached upon or threatened in some way. If none of the rights conferred by the license is being impinged upon, I find no statutory right to a hearing.

The point upon which we differ is elusive and difficult to pin down, but it is exceedingly simple. Perhaps if we visualize a proceeding we will make it clear. A case to which A and B are parties is pending before some tribunal. An outsider, M, appears and files a paper in which he asks to be made a party.[21] But he does not allege any fact which shows that he has any interest in the case, or that he would be affected by it, or even raises any substantial question in that respect. My view is that such an unsupported request can be denied without an oral argument. The court says

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[19] Rule 9 (b) of the Rules of the District Court of the United States for the District of Columbia.

[20] Secs. 312(b), 303(f), 309(a).

[21] The court says that WJR was not an "outsider" to this proceeding. Certainly it was not a party, and it certainly had no right to be a party unless its license rights were threatened. Absent such threat, it was as much an outsider to the proceeding as if it had no broadcasting license. It seems to me that the Supreme Court was quite meticulous in making this clear by its discussion of the converse situation in the *National Broadcasting Co.* case, *supra*, note 1.

that the Constitution requires that he have oral argument, in order that he may have a chance to persuade the tribunal that he has an interest despite his allegations. In its practical effect, the court requires that every petition for intervention be set for oral hearing, no matter what the petition says or fails to say. I say that tribunals have some measure of leeway to dispose of such petitions without hearing, if they do not even raise a substantial question as to the petitioner's interest. In its theoretical concept, the court seems to hold that the Constitution protects all pleaders against stupidity, laziness or ineptness with the written word. My view is that the Constitution requires him who wants to participate in a pending case to exert at least a modicum of effort and to indicate in writing at least some shadow of factual ground for his prayer.

76 The court does not reach the merits of WJR's petition. It is my view that it should proceed to consider whether the Commission was right or wrong in denying the intervention. The error, if there was any, on the part of the Commission was in holding that WJR was not entitled to participate in the proceeding. The error was not, in my view, in merely so deciding upon the written petition without oral argument.

77 United States Court of Appeals, for the District of Columbia Circuit

October Term, 1948

No. 9464

WJR, The Goodwill Station, Inc., appellant,

*v.*

Federal Communications Commission, appellee;

Coastal Plains Broadcasting Company, Inc., intervener

Filed Oct. 7, 1948. Joseph W. Stewart, Clerk.

Appeals from the Federal Communications Commission

Before: Stephens, Edgerton, Clark, Wilbur K. Miller and Prettyman, JJ.

*Judgment*

This cause came on to be heard on the transcript of the record from the Federal Communications Commission, and was reargued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the decision of the said Federal Communications Commission appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to

the said Federal Communications Commission for further proceedings in accordance with the opinion of this Court.

Per Chief Judge STEPHENS.

Dated October 7, 1948.

Dissenting opinion by Circuit Judge Prettyman, in which Circuit Judge Edgerton concurs.

78 In the United States Court of Appeals for the District of Columbia Circuit

No. 9464

WJR, THE GOODWILL STATION, INC., APPELLANT,

*v.*

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE;

COASTAL PLAINS BROADCASTING COMPANY, INC., INTERVENER

Filed Dec. 15, 1948. Joseph W. Stewart, Clerk.

*Designation of Record*

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix.

2. Copy of copy of letter from Clerk to counsel, dated May 22, 1947, with respect to reargument, as amended by letter dated May 27, 1947.

3. Opinion of the United States Court of Appeals for the District of Columbia.

4. Judgment of the United States Court of Appeals for the District of Columbia.

5. Designation of record.

6. Clerk's certificate.

PHILIP B. PERLMAN,
*Solicitor General of the United States of America.*
HARRY M. PLOTKIN,
*Acting General Counsel,*
*Federal Communications Commission,*
MAX GOLDMAN,
*Acting Assistant General Counsel,*
*Federal Communications Commission,*

Receipt of a true copy of Appellant's "Designation of Record" is hereby acknowledged this 14th day of December, 1948.

KELLEY E. GRIFFITH,
*Counsel for Appellant,*
FRANK U. FLETCHER,
*Counsel for Intervener.*

80 United States Court of Appeals for the District of Columbia Circuit

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia Circuit, formerly United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered 1 to 74, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties, and the proceedings of the said Court of Appeals as designated by counsel in the case of: WJR, The Goodwill Station, Inc., Appellant, *v.* Federal Communications Commission, Appellee; No. 9464.—October Term, 1948, as the same remain upon the files and records of said Court of Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this twenty-fourth day of December, A.D. 1948.

JOSEPH W. STEWART,
*Clerk of the United States Court of Appeals for the District of Columbia Circuit.* (Seal.)

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80 Supreme Court of the United States

No. 495, October Term, 1948

*Order allowing certiorari*

Filed February 28, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Murphy took no part in the consideration or decision of this application.

81 In the Supreme Court of the United States

October Term 1948

No. 495

*Stipulation as to printed record*

Filed March 17, 1949

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto, that for the consideration of this case on the writ of certiorari to the United States Court of Appeals, District of Columbia Circuit, granted February 28, 1949, the printed record may consist of the record as designated on the petition for writ of certiorari and the following additional material:

Table 15–8, page 181 of the record.
Table 17–8, page 182 of the record.
Table 16–8, page 183 of the record.
Figure 4–1, page 184 of the record.
Figure 12–3, page 185 of the record.

It is further agreed that in briefs for the respective parties, reference may be made to any portion of the transcript of record which is not included in the printed record as aforesaid.

Philip B. Perlman
PHILIP B. PERLMAN,
*Solicitor General of the United States of America.*
Harry M. Plotkin
HARRY M. PLOTKIN,
*Acting General Counsel, Federal Communications Comm.*
Max Goldman,
MAX GOLDMAN,
*Asst. General Counsel, Federal Communications Comm.*
DONALD C. BEELAR,
*Counsel for Respondent.*
FRANK U. FLETCHER,
*Counsel for Coastal Plains Broadcasting Company, Inc.*

Dated March 16, 1949.

[File endorsement omitted.]

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